No. 1770.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

Charles W. Clark,
Appellant,

vs.

Rosario Mining & Milling Company, a corporation,
Appellee.

Appealed from a decree of U. S. Circuit Court, Northern District of California, rendered for appellee for $134,250.00 damages, v. appellant for the breach of a contract of sale of the Rosario mines in Mexico.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

The statement of the case given in brief of appellant is of great length, contains much irrelevant and redundant matter and fails to give some facts essential for a proper disposition of this case. We therefore give the following

STATEMENT OF THE CASE.

Complainant, The Rosario Mining & Milling Company, a corporation, organized under the laws of the state of Texas, sought to compel the specific performance of a written contract, under the terms of which it

agreed, for $400,000.00 to sell, and the defendants, Charles W. Clark, Frank L. Sizer, and one Edward L. Whitmore, agreed to buy the Rosario mining property situated in the state of Chihuahua, Republic of Mexico, Clark being the principal party interested, his associates being his agents, whom he agreed to permit to participate with him in the purchase in the event he bought the property. Whitmore died before the suit was commenced, and William Falconer, the administrator of his estate, was therefore made a party defendant. Sizer and Falconer, being residents and citizens of the state of Montana, could not be served with process; nor have they entered their appearance.

The amended bill contains a prayer for specific performance of the contract and for general relief. [Transcript, p. 4.]

In an answer of great length, Clark denies the equities of the bill, and alleges that he was induced to sign the contract through the fraud of the complainant and its officers and agents, perpetrated by the connivance and through the assistance of Whitmore and Sizer, while in his employ. The defendant Clark also pleaded that complainant's title to the property was defective, that the contract was wanting in clearness and fairness, that the same was ambiguous, and therefore a court of equity could not specifically enforce the same. [Transcript, p. 46.]

The contract in suit is dated May 1st, 1902, and a copy thereof is attached to the amended bill as an "Exhibit" and made a part thereof. The material provisions of the contract are as follows:

"Whereas, *the said second parties (Clark, Sizer and "Whitmore) have, after examination of said property, "and the titles thereto, notified the first party (The "Rosario Mining & Milling Co.) that the second party "is satisfied with the titles to said property in the first "party;* and whereas, the second party has notified the "said first party that they will not exercise their said "options to buy said property at the price of $800,000, "but have offered to the first party to buy the said prop- "erty at the price of ($400,000) four hundred thousand "dollars cash (American gold); and whereas the first "party has refused to accept said offer; and" * * * *

"Whereas, the second parties as a consideration in "part for this option contract is desirous of keeping "open said offer to buy said property at the price of "$400,000, subject to the right of the first party to ac- "cept the offer at any time during the life of this con- "tract."

The first paragraph of the substantive position of the contract, is as follows:

"The second parties offer to the first party to buy "from the first party said property and to pay to the "first party therefor the sum of $400,000 four hun- "dred thousand dollars, American gold, at Fort Worth, "Texas, and to make said payment within thirty days "after being notified of an acceptance by the first party "of said offer; provided, however, that if the said offer "is accepted within the next four months, the second "party shall have until Sept. 1st, 1902, to make such "payment. *The first party concurrently or as near as*

"may be with such payment to cause to be transferred "to the second parties the titles which the first party "through its directors or otherwise has in and to said "property. And the second parties agree to leave said "offer open for one year from his date, subject to the "acceptance of the first party at any time during the "said year. Said titles having been examined by the "second parties it is agreed that the same are good and "sufficient."

Other provisions of the contract were: An option to purchase at $600,000 granted to Clark and his associates and they were to remain in possession and to continue to develop the property. An important provision is as follows:

"8. In the event of an acceptance by the first party "of the offer of the second parties to buy said property "at the price of $400,000 and a failure or refusal of the "second parties to make good the offer to buy said prop- "erty, then the second parties shall be liable to the first "party in damages in the stipulated sum of $100,000. "The object of this clause of this contract is to make "the measure of damages certain, whereas, without "such stipulation by reason of the peculiar character "of the property and situation and surroundings of the "parties, it would be impossible to arrive at any just "and correct measure of damages by proof in a court "of law. And in the event the first party shall not sell "said property to other parties or contract to do so ac- "cording to the terms of this contract and the second "parties shall under the provisions of this contract be-

"come entitled to exercise their option to buy the said "property at $600,000, and shall elect to exercise said "option and shall thereupon offer to purchase said prop- "erty at said price and the first party shall fail or refuse "to comply with this contract to sell their said property "at that price, then the first party shall be liable to the "second parties in liquidated damages to the amount of "$100,000. This shall not deprive the second parties of "the right to waive damages and have specific perform- "ance of this contract." [Transcript, pp. 23-36.]

By a supplemental agreement, paragraph I was so modified that Clark and his associates were to have ninety instead of thirty days in which to make payment, after written notice of the acceptance by complainant of the $400,000 offer. [Transcript, pp. 36-7.]

On April 28th, 1903, written notice of the acceptance of said offer by complainant was duly served upon Clark, Sizer and Whitmore; a deed to the property in question was duly executed as required by the terms of the contract and tendered by complainant to the defendants; but the defendants have failed to make payment of either the stipulated purchase price or the stipulated damages, to-wit, $100,000 for the breach of said contract.

The Decree.

The lower court found in favor of complainant on all the issues of fraud and held the contract was valid and binding. It further found that the contract was ambiguous in this: the 8th paragraph provided for the pay-

ment of damages to complainant in the event of a breach by defendants and likewise made a similar provision in favor of defendants, giving the latter also the right of specific performance of the *option contract*.

Because of this ambiguity the court held that the contract of sale could not specifically be enforced. RETAINING JURISDICTION OF THE CASE, THE COURT RENDERED A DECREE IN FAVOR OF COMPLAINANT APRIL 15TH, 1909, AGAINST DEFENDANT CLARK FOR THE LIQUIDATED DAMAGES AND INTEREST AGGREGATING THE SUM OF $134,250.00.

Defendant in his answer alleges and his counsel in their brief state that "at the time of signing the contract "he (Clark) believed that under its terms he would "never be called upon specifically to perform the same."

Counsel for appellant also state on p. 14 of their brief, "The construction of the contract given by the "court is fully in accord with the law and with the argu- "ment presented on behalf of appellant to the lower "court."

In reply to appellant's assignments of error and argument of counsel we shall follow the order pursued by them.

I.

Counsel for appellant contend in their first assignment of error, that

"The court erred in assuming and retaining jurisdiction in equity of this suit, because the complainant had barred itself of the right to sue for specific performance."

(1) Counsel contend that if specific performance was impossible at the time of commencing this suit, and this fact was known to the complainant, then complainant had no standing in a court of equity and the lower court wrongfully assumed jurisdiction of this case and erred in rendering a decree for damages against the defendant for a breach of the contract.

The whole brief seems to be based on the theory that *this suit was an action for specific performance, and that defendant had no notice or warning whatever by the pleadings or otherwise that plaintiff could in any event recover damages for a breach of the contract.*

In reply to this contention, we will state

(1) That there is no assignment of error made by the appellant in the record upon which to base said contention.

We submit that the appellant cannot make any objection to the decree unless such objection is based on an assignment of error.

However, we will not rest our contention on this question solely upon this technicality and will therefore proceed to present argument and counter-propositions based on the merits of the assignment of error.

We will undertake to dispel this illusion under which counsel for appellant have been laboring that neither opposing counsel nor appellant *had "any warning or notice,"* in the event the court should refuse specific performance, that damages might be awarded for a breach of the contract.

(2) The Amended Bill.

The amended bill clearly states a cause of action, in which complainant seeks to compel the specific performance of the written contract, dated May 1st, 1902, by the terms of which it agreed for $400,000 to sell and defendants Clark, Sizer and Whitmore agreed to buy the mining property in question. An offer of $400,000 was made to complainant by said Clark, Sizer and Whitmore for said property provided written notice of acceptance of said offer was given by complainant at any time within 12 months from the date of said contract.

That notice of acceptance of said offer was duly served upon Clark and his associates on April 28th, 1903, and thereby said Clark, Sizer and Whitmore became liable and promised to pay complainant at Fort Worth, Texas, the said sum (in ninety days) on the 27th day of July, 1903. That complainant in due time duly executed and tendered a deed in accordance with the terms of said contract, which conveyed said property to said defendants. A copy of said contract was attached to said amended bill as exhibit "A" and the same was made a part thereof and that paragraph 8 of said contract is clearly set forth in said amended bill as follows:

That *"In the event of an acceptance by the first party*

"(complainant) of the offer of the second parties (said "Clark, Sizer and Whitmore) to buy said property at the "price of $400,000, and a failure or refusal of the second "parties to make good the offer to buy said property, "then the second parties shall be liable to the first party "in damages in the stipulated sum of $100,000. The "object of this clause of this contract is to make the "measure of damages certain, whereas without such "stipulation by reason of the peculiar character of the "property and situation and surroundings of the par-"ties, it would be impossible to arrive at any just and "correct measure of damages by proof in a court of law."

The breach of said contract by the defendants is clearly and distinctly alleged.

The amended bill closes with a special prayer for the specific performance of the contract and a further prayer *"for such other and further relief as it may be entitled "to."* [Transcript, pp. 4 to 23.]

We submit that the amended bill clearly states two causes of actions; one for *specific performance* of the contract and the other *for damages for the breach thereof.* If for any reason the court should not see fit to grant the special relief prayer for, to-wit, the specific performance of the contract, then we submit, under the allegations and prayer for general relief in the bill the complainant would clearly be entitled to damages for the breach of the contract, and defendant Clark certainly had *notice* thereof.

The force and effect of a prayer for general relief will be discussed fully later.

(3) **The office and the effect of exhibits attached to pleadings.**

We quote from Fletcher on Equity Pleading and Practice, section 99, as follows:

"PLEADING DOCUMENTS---A bill must be complete in itself, by proper averments and exhibits attached. Documents appended to pleadings as exhibits are as fully a part of the pleadings as if incorporated therein."

AUTHORITIES.

Willard v. Davis, *et al.*, 122 Fed. Rep. 363;
Surgel v. Byers, 23 Fed. Cases 436; No. 13629;
Electrolibration Co. v. Jackson, 52 Fed. Rep. 773;
Marshall v. Turnhull, 34 Fed. Rep. 823;
Sweebass v. Mut. Fund Life Assn., 82 Fed. Rep. 792;
Minter *et al.* v. Bank of Mobile, 23 Ala. 762;
Lockheard v. Burkley Springs etc. Co., 40 W. Va. 552;
Kester v. Lyon, 40 W. Va. 161;
National Park Bank v. Haile *et al.*, 30 Ill. App. 17.

We will refer to a few of the above cases cited to illustrate the elementary principle of equity pleading, that if a copy of an instrument like the contract in question is attached to a pleading as an exhibit it is a part of the pleading and *every statement and stipulation in such exhibit is in fact an allegation and averment of the pleading.*

So a copy of the contract being attached as an exhibit

to the amended bill in this case and made a part thereof constitutes a part of the averments and allegations of the bill and paragraph 8 of the contract clearly alleges the damages resulting from the breach of the contract.

(a) Surgel v. Byers, 23 Fed. Cases 436, No. 13629.

This was an action in equity to set aside a sale of land under execution because of the inadequacy of the consideration. We quote from said case as follows:

There were two *"Exhibits 'A' and 'B'"* attached to the bill "purporting to be copies from the records of "deeds by which portions of the land levied upon and "sold were conveyed by Stephen and Duncan to com- "plainant. *These copies were filed with the bill as ex- "hibits and therefore in legal intendment made parts "thereof. The same notice therefore which was given "of other portions of the bill, was given of the character "of that part of it which was constituted by these docu- "ments."*

(b) Electrolibration Co. v. Jackson, 52 Fed. Rep. 773.

This case was an application for injunction in a patent case and the court quoting from Daniels Ch. Pr. with approval said:

"It is always necessary in drawing bills to state the "case of the plaintiff clearly though succinctly, upon "the record; and in doing this, *care should be taken to "set out precisely those deeds which are relied upon and "those parts of the deeds which are most important to "the case.*

"It is true that on motion for injunction the letters "patent were filed as evidence and the document is be-

"fore us, among the papers in the case. *But it is not a "part of the record, not even the loose reference men-"tioned above is contained in the bill to make it a part "of the pleading, which alone is the technical record.* "Reference to it is gained by implication only from the "fact its existence is stated. *It is not pleaded at all. So "found in the papers, it cannot aid this pleading."*

(c) Seebass v. Mutual Fund Life Assn., 82 Fed. 792.

We quote from the opinion in said case, as follows:

"This action is brought upon a contract of insurance "upon the life of one Oscar Seebass and *a copy of the "policy upon which the suit is founded is annexed to the "declaration referred to therein and thereby became a "part of the record."*

(d) Marshall v. Turnhull, 34 Fed. Rep. 823.

This was a case to enforce a trust and we quote from the opinion in said case as follows:

"The bill is also demurrable for the reason that *it "neither sets forth copies of the instruments by which "the mortgage under which complainant's claims were "created, nor contains any averment setting forth the "terms thereof. The demurrer is sustained with leave to "amend."*

(e) Willard v. Davis *et al.,* 122 Fed. Rep. 363.

Putnam, circuit judge, rendered the opinion in this leading case and we quote from the same as follows:

"Before the trial of the suit at common law, the com-"plainant brought this bill, praying that the release be "reformed to express the 'true intent and meaning of

" 'the parties thereto,' as stated in the bill, and that the "defendant in the suit at law be enjoined from setting "up the release as a defense thereto.

"The bill makes certain exhibits (H, I and J) parts of "it, in such way that they are not to be considered mere- "ly as evidence, but as qualifying and limiting the com- "plainant's formal allegations."

(f) Minter *et al.* v. Bank at Mobile, 23 Ala. 762.

This was a bill in equity to enjoin the enforcement of a judgment. *A letter written by the plaintiffs was attached to the bill as an exhibit and made a part thereof.*

We quote from the opinion in said case, page 763, as follows:

"The bill, as to the demand for interest on the judg- "ment from 1844, when the money, as it is alleged, was "tendered to the bank and refused, would, we incline to "think, have equity in it, if this allegation were not de- "prived of its force by the adoption of the letter of Mr. "Holcombe, the assistant commissioner, to the solicitors "of the complainants, as part of the bill. *The statements "of this letter relating to the subject matter of the bill "are thereby made the statements or averments of the "bill, since they are not in any manner qualified, but sim- "ply annexed by way of exhibit, and prayed to be taken "as part of the bill."*

(g) National Park Bank v. Haile *et al.*, 30 Ill. App. 17.

We quote from the opinion in this case as follows: *"The instrument itself (a bill of sale) is an exhibit to "the bill and made a part thereof, the effect being equiva- "lent to setting it out in haec verba in the bill. * * * The*

"instrument executed by Colnfield's agent, being made a "part of the pleading, was equivalent to the insertion of "an additional allegation that the security was given "generally to insure the payment of the notes."

We therefore submit that the statements in paragraph 8 of the contract were part of the averments and allegations of the bill.

(4) The General Demurrer.

The following general demurrer was interposed by said defendant, as follows:

I.

"A. That said complainant has not by said bill made "such a case as entitles it in a Court of Equity to any "relief from or against this defendant touching the mat- "ters contained in said bill of complaint or any of said "matters.

"B. That said bill of complaint shows no substantial "right or equity in or on behalf of said complainant, and "it appears by complainant's own showing that it is not "entitled to the relief prayed for in and by said bill." [Transcript, p. 44.]

The general demurrer was argued at length and fully briefed by counsel for both parties in the lower court; said briefs are still there on file and speak for themselves, and it was contended in forcible terms that complainant could not maintain its action in equity for a specific performance of the contract because of the ambiguity therein and because complainant had a clear, full and adequate legal remedy.

Counsel for defendant urged that the court had no jurisdiction of the case and that the bill should be dismissed and complainant should bring this action for damages in a court of law.

Order Overruling Demurrer.

After a careful consideration of the amended bill and the arguments advanced pro and con by respective counsel Judge Morrow overruled said demurrer. [Transcript, p. 45.]

Judge Morrow thereby held that the amended bill on its face set forth a good and just cause of action for equitable relief, to-wit, the specific performance of the contract, notwithstanding paragraph 8 of the contract.

(5) Allegations in Defendant's Answer.

We quote from defendant's answer, paragraph XLVIII, as follows:

The defendant "relying upon the provisions of the "contract that while the parties of the second part there-"in named might maintain a suit for specific perform-"ance as against the seller, the seller could not maintain "such a suit as against them or as against this defend-"ant, this defendant signed said contract and delivered "the same." [Transcript, p. 87.]

Again we quote from defendant's answer, paragraph L, as follows:

"At said time (of execution of the contract) this de-"fendant is informed and believes that said parties did "not expect this defendant ever to pay or ever to be able "to pay said sum of four hundred thousand ($400,-"000.00) dollars." [Transcript, pp. 88-9.]

Again we quote from defendant's answer, paragraph LIV, as follows:

"That in view of the expressed provision of said con-"tract that the parties of the second part therein named "might maintain a suit for specific performance and the "silence of said contract in regard to the party of the "first part maintaining such suit, *it was, at least, ex-"tremely doubtful whether a suit on said contract could "be successfully maintained," by complainant.* [Tran-script, p. 91.]

(6) Defendant's Brief in this Case in the Lower Court.

We quote from said brief, page 168, as follows:

"The rule *expressio unius est exclusio alterius* ap-"plies directly to this provision. *After providing for "liquidated damages in the event of a breach, in favor of "the complainant, the contract makes a similar pro-"vision in favor of the defendants,* and expressly pro-"vides that this provision shall not deprive the defend-"ants of the right to waive damages and have specific "performance of the contract."

Again we quote from said brief (p. 171) as follows:

" 'That the provision for liquidated damages in favor " 'of each party should not deprive the second parties " 'of the right to waive damages and have specific per-" 'formance,' and exclude the first party therefrom, then "we submit, *the contract is so ambiguous, so doubtful, so "uncertain that a court of equity will not order specific "performance* at the suit of the first party to the con-"tract."

Judge Dietrich in his opinion rendered in this case states:

"In so far as a principle of law was announced or "clearly involved in the decision (of Judge Morrow "overruling said demurrer) *I would unhesitatingly rec-"ognize it as controlling; but in some measure at least, "the question whether or not the complainant waived "the remedy of specific performance is illuminated by "the evidence, and, if so, the duty to again entertain it "is plain."* [Transcript, p. 160.]

Again Judge Dietrich in his opinion states:

"The apparent meaning of the instrument (contract) "is that in case of the refusal to purchase, the only rem-"edy against the defendant is one for damages. This is *"the probable construction* that Clark, Whitmore and "Sizer gave to it (the contract)." [Transcript, p. 162.]

It will be noticed that counsel for defendant in their brief in this case filed in the lower court referring to said paragraph 8, state:

"After providing for liquidated damages, in the event "of a breach, in favor of the complainant, the contract "makes a similar provision in favor of the defendant."

The defendant thus contended and *admitted* that complainant did have an action for liquidated damages for $100,000 against the defendant in the event of a breach of the contract and the defendant strongly urged this defense in order to deprive the complainant from maintaining its action for specific performance.

Now, after all this, can the defendant be permitted to

say that he had no notice of the complainant's right to recover damages, that he was *surprised* or *injured* by the decree?

The lower court awarded damages just as was contended for by the defendant. The defendant got exactly what he asked for and now counsel for defendant strenuously objects to the decree rendered for damages. *"Consistency, thou art a jewel."*

Appellant in his brief repeatedly states that he has been greatly surprised and injured by the decree. We assert that such *surprise and injury now urged does not come in good grace,* the pleadings and prayer in the amended bill considered, which are clearly and amply sufficient to support the judgment rendered.

Counsel for appellant in their brief in the lower court above quoted, states that by reason of paragraph 8 the contract is so *ambiguous, doubtful and uncertain,* that a court of equity will not order specific performance at the suit of the first party to the contract.

Judge Morrow held that notwithstanding the contract was a part and parcel of the amended bill, yet the allegations thereof were sufficient and the bill showed a good and just and equitable cause of action for the specific performance of the contract.

After considering all the evidence in the case in regard to the contract, and especially in regard to paragraph 8 of the contract and the intentions of all the parties thereto, Judge Dietrich held to the *contrary* and decided that it would be inequitable to specifically enforce the contract. He therefore gave the complainant a decree for damages as contended for by defendant.

Judge Dietrich further held, that the meaning of said paragraph 8 of the contract, as to whether or not it gave the complainant an equitable cause of action, was *doubtful* and *not clear;* that where there is such doubt there is a substantial ambiguity, and that such doubt should be "resolved against the complainant."

And it was by reason of this *doubt* and *ambiguity* existing in the contract that the court held it would not be proper to grant the equitable relief of specific performance.

We submit, here is an instance where two of the greatest judges that ever graced any bench differed as to the meaning and construction to be given and placed upon this contract.

It became necessary for the lower court to assume jurisdiction of this case in order to pass upon *this* most important question of *ambiguity* in the contract and other equitable issues. Having proper jurisdiction of the case and after finally determining that the ambiguity of the contract made the specific performance thereof inequitable, the court, in accordance with the doctrines so well established by the great weight of authority, did retain jurisdiction *in order to do full and complete justice between the parties with respect to the subject matter, by awarding to the complainant liquidated damages, provided by the terms of the contract, without requiring the complainant to be put to the trouble, expense, and delay of a second suit brought in another tribunal.*

We respectfully submit, that the following proposition is well established by the overwhelming weight of authorities, to-wit:

In a bill seeking specific performance of a contract for the sale of land, the court may mould its decree according to the circumstances as they appear at the time, and grant such relief as may come within the scope of the bill as may be supported by the proof. "And to this end when jurisdiction has been obtained on other grounds and for the purpose of administering the equitable remedy, damages may be assessed and adjudged in lieu of or as ancillary to the equitable relief, so that the complainant may not be put to the trouble, expense and delay of a second suit brought in another tribunal."

Pomeroy on Specif. Per. of Contracts, Sec. 474;
Cathcart v. Robinson, 5 Peters 264 (L. Ed. 120);
Waite v. O'Neil, 76 Fed. Rep. 408, by C. C. A.;
Haffey v. Lynch, 143 N. Y. 241;
Parkhurst *et al.* v. Van Courtlandt, 1st John 273 (Chan. Rep. N. Y.);
Cushman v. Bondfield, 139 Ill. 211; 28 N. E. 937;
Duckett v. Duckett, 71 Md. 357;
Green v. Drummond, 31 Md. 71;
Holland v. Anderson, 38 Mo. 55;
Allum v. Stockbridge *et al.,* 8 Baxter (Tenn.) 356;
Phillip v. Thompson, 1 John 131 (Chan. Rep. N. Y.);
20 Ency. of Pleading & Procedure, Sec. 511;
Warvelle on Vendors, Sec. 963.

We now will briefly review some of the above cases and show how conclusive they are upon all the issues involved in this case.

(a) We first call the attention of the court to the leading case cited by appellant in regard to the powers

and jurisdiction of courts of equity in suits for specific performance of contracts for the sale of land, to-wit:

Cathcart v. Robinson, 5 Pet. 264; 8 L. Ed. 120.

In this case the complainant, Robinson the vendor, brought suit against the vendee, Cathcart, for the specific performance of a written contract for the sale of land, the purchase price *being* $8,000. The contract contained a clause that if either party "breached the contract they "should pay the other a penalty of $1,000" as liquidated damages. The complainant in the bill did not sue for damages for the breach of the contract either in the alternative or otherwise. There was a special prayer for the specific performance of the contract and also *a prayer for general relief.*

We quote from the opinion rendered by Chief Justice Marshal in the case as follows:

"The answer of Cathcart resists the claim for the per-"formance of the contract on three grounds:

"(1) That he was induced to enter it by the fraudu-"lent misrepresentations of the plaintiff;

"(2) That the price was excessive;

"(3) That he executed the contract under an impres-"sion sanctioned by the conduct of the plaintiff that at "any time before its completion he might release himself "from it by paying the penalty of $1000."

The misrepresentations alleged in the answer were in respect to the boundary of the premises, the fitness of the premises for an academy and as to the value thereof.

The trial court found against the defendant on the is-

sues of fraud, and rendered a decree for specific performance, and the defendant appealed the case.

We further quote from the opinion of the Supreme Court, as follows:

"Mr. Cathcart signed the agreement in the full belief "that he might relieve himself from it by paying the pen- "alty. This belief was openly expressed, was communi- "cated to Mr. Robinson and the penalty was reduced by "consent to $1000, on which condition alone Mr. Cath- "cart would agree to sign the contract. These circum- "stances taken together, satisfy the court, not only that "Mr. Cathcart *signed the agreement believing that it "left him at liberty to relieve himself from it by paying "the penalty but that Mr. Robinson knew how he under- "stood it.* No untruth has been suggested, but if Mr. "Robinson knew that Mr. Cathcart was mistaken, knew "that he was entering into obligations much more oner- "ous than he intended, that gentleman is not entirely ex- "empt of the imputation of suppressing the truth. The "difference between that degree of unfairness which will "induce a court of equity to interfere actively by setting "aside a contract and *that which will induce a court to "withhold its aid is well settled.*

"If to *unfairness a great inequality between the price "and value be added, a court of chancery will not afford "its aid. In the case at bar, this inequality is very con- "siderable.* This inequality gives importance to the mis- "take under which the purchaser executed the agree- "ment. A mistake to which the vendor contributed by "consenting to reduce the penalty to the sum which the "vendee said he could pay should circumstances make it

"his interest to absolve himself from the contract by its "payment.

"It has been argued by counsel that if the penalty only "could be decreed, this bill ought to be dismissed because "the penalty might have been recovered at law.

"We do not think so. The right of a vendor to come "in to a court of equity to enforce a specific performance "is unquestionable. Such subjects are within the settled "and common jurisdiction of the court. It is equally well "settled that if the jurisdiction attaches, the court will "go on to do complete justice, although in its progress "it may decree on a matter which was cognizable at law. "Mr. Robinson (the vendor) could not have sued for the "penalty at law without abandoning his right to enforce "the contract of sale. He could not be required or ex- "pected to do this. Consequently, he came properly into "a court of equity, and the court ought to do him jus- "tice. It ought to direct Mr. Cathcart to pay that which "he says was to be, according to his understanding, a "substitute for the principal subject of the contract.

"It is the opinion of this court that the Circuit Court "erred in decreeing the defendant in that court to re- "ceive a conveyance for the tract of land in the proceed- "ings mentioned, called Howard, and to pay therefor the "purchase money stipulated in the contract, dated the "10th of Sept., 1882, and that so much of said decree "ought to be reversed; and *that the cause be remanded "to that court with instructions to reform the said decree "so far as to direct the defendant to pay the penalty of "one thousand dollars with interest thereon."*

It will readily be seen that the Cathcart case, in almost every particular, is identical with this. In that case the defendant alleged numerous misrepresentations, which he says induced him to execute the contract, and which rendered the contract void.

The trial court found against the defendant on all of said fraudulent representations. The defendant alleged, and introduced proof which tended to show, that there was *great inequality* between the value of the land and the purchase price, and furthermore, that he was induced to sign the contract which provided for the payment of $1000 penalty, under the impression *that if he did breach the contract, he could absolve himself from the contract by paying the penalty or stipulated damages.*

The Supreme Court, after reviewing the evidence, found that the evidence showed that there was *great inequality between the purchase price and the real value of the land* and furthermore that the contract was signed under the mistake and belief by the defendant *that if the contract was breached he could pay the penalty and would not be required to pay the purchase price,* and that the complainant knew this to be true.

The case was reversed by the Supreme Court and remanded, and the lower court was directed to retain jurisdiction and to enter a judgment in favor of the complainant for the liquidated damages in the sum of $1000, with interest thereon.

Now the defendant, Cathcart, in his answer, did not offer to pay the $1000 damages and thereby to absolve himself from the contract, as asserted by counsel for appellant, *but he only set up this defense in order to pre-*

vent the plaintiff from recovering anything whatever on his action for specific performance, because the Supreme Court states:

"It has been argued by counsel (for the defendant) *"that if the penalty only could be decreed this bill ought "to be dismissed, because the penalty might have been "recovered at law."*

Now this is the exact contention made by counsel for defendant Clark in this case. It is stated in his answer and briefs *that from the terms of the contract the complainant had an action for damages only,* and that it is entirely precluded from recovering on its cause for specific performance of the contract by reason of the doubt, uncertainty and ambiguity in the contract and because complainant has a full and adequate legal remedy.

Counsel for defendant contends, therefore, *that the case ought to be dismissed, because the court had no jurisdiction of the case, as the penalty or damages for the breach of the contract could only be recovered in a court of law.*

Now, why did the Supreme Court refuse to dismiss the Cathcart case? Why did it reverse and remand the case and direct *that the trial court should still retain jurisdiction for the sole purpose of granting legal relief,* to-wit, for entering a judgment for damages for the breach of the contract?

In all cases for specific performance of contracts the courts of equity have exclusive jurisdiction. The chancery court had to take cognizance and jurisdiction of the Cathcart case in order to determine whether the com-

plainant was entitled to equitable relief. The court necessarily had to pass upon all the issues of fact in the case to determine whether or not the complainant was entitled to any equitable relief upon his action for specific performance.

The Supreme Court in the Cathcart case held, the *complainant was not entitled to any equitable relief because there was great inequality in the purchase price and this added to the unfairness in the contract and because the plaintiff knew that the defendant signed the contract under the mistaken belief that he could pay the penalty or liquidated damages and thereby absolve himself wholly from the contract.* The combination of these two grounds of defense, therefore, rendered it inequitable to specifically enforce the contract.

Now in the case at bar, the defendant interposed in the lower court the demurrer that there was no equity shown in the bill and furthermore, complainant had an adequate legal remedy.

The lower court necessarily had to take cognizance and assume jurisdiction of the case, first to pass on said issues of law and secondly, to determine the issues of fact, whether or not there was a want of equity in the bill by reason of the alleged fraud and misrepresentations which defendant says induced him to execute the contract, and of defective title alleged by the defendant and also to ascertain whether or not the meaning of the contract was clear and free from ambiguity, in granting or withholding from complainant the remedy of specific performance.

The court did pass upon and adjudicate all of said in-

tricate issues of law and fact and held that the contract was free from fraud and was valid and binding.

It further held *that the meaning of the contract was not clear, that the contract was not free from ambiguity, that this doubt and ambiguity must be resolved against the complainant,* and when so construed, the contract discloses an intention to withhold from complainant the right to require the defendants to specifically perform the contract.

Now we submit that the lower court properly took cognizance of and acquired jurisdiction of this cause in order to adjudicate all of said important issues. It required nearly five years time, the expenditure of thousands of dollars in preparing the case for trial and the racking of the brain of all the attorneys in the case during all of said time, by their strenuous efforts for their respective clients, to enable the court to properly pass upon and adjudicate all of said complicated issues.

It is well settled by all eminent authorities and the adjudicated cases:

"That whenever a court of equity had once acquired jurisdiction of a case it will retain such case in order to do full and complete justice between the parties with respect to the subject matter to this end, when jurisdiction has been obtained on other grounds and for the purpose of administering an equitable remedy, damages may be assessed and adjudged in lieu of or as ancillary to the equitable relief so that the plaintiff may not be put to the trouble, expense and delay of a second trial brought in another tribunal."

Pomeroy on Spec. Per. of Con., section 474.

Mr. Pomeroy further states in said section:

"All the instances in *which equity thus awards dam-*

"*ages either in place of* or in addition to some other spe-
"cial remedy are particular applications to the one gen-
"eral principle *that complete justice shall be done be-*
"*tween litigant parties whenever jurisdiction has been*
"*acquired for them to grant any relief. This doctrine is*
"*well established and is indeed too familiar to require*
"*the citation of authority.*"

We will now refer the court to and quote from some of the decisions of courts of last resort, both state and federal, above cited on the power and jurisdiction of courts of equity, in suits for specific performance of contracts.

(a) Waite v. O'Neil, 76 Fed. Rep. 408—C. C. A.

This was a suit in equity for specific performance of an alleged covenant obligating the lessees to construct and keep in good repair a roadway along a new bank on a navigable river. The court held: It was proper to retain jurisdiction to award damages for breach of the contract, after having refused to grant any equitable relief whatever in the action.

(c) Parkhurst *et al.* v. Van Courtlandt, 1 Johnson Chan. Rep. (N. Y.) 273.

This was a suit brought by the plaintiff for the specific performance of a contract to convey land. The plaintiff having taken possession of the property and made valuable improvements thereon. The prayer in the bill was for the *specific performance of the contract and for an injunction to stay the suit at law. The plaintiff did not sue for damages, neither was there any specific prayer for damages.* In passing upon the facts in this

important case, we quote from the opinion of *Chancellor Kent, page 285,* as follows

"The uncertainty of the terms of the agreement is, "then of itself, an insuperable objection to the specific "execution sought by the bill; and the compensation for "improvements which can be awarded under the author- "ity of the court affords to the party an adequate and "more suitable relief. Not only the case last cited, but "the reasons and authorities contained in the recent de- "cision in Phillips v. Thompson and others, show that "the court possesses *ample jurisdiction over this ques- "tion of compensation and that, though other relief can- "not be granted, the bill may be sustained for that pur- "pose."*

This case is a parallel case to the case at bar. Chancellor Kent refused to enforce the contract because of the *uncertainty* of its terms but retained jurisdiction and granted *legal relief in lieu of the equitable relief* sought and prayed for in the bill.

(d) Cushman v. Bondfield, 139 Ill. 211; 28 N. E. 937.

This was also a suit for the specific enforcement of a plan of reorganization of a railway company, embodied in a written agreement.

We quote from the opinion in this case (28 N. E. 945) as follows:

"The point is also made that the *decree is not war- "ranted by the prayer of the bill. It is true, there is no "specific prayer for a money decree; the relief specifically "prayed for being what would be substantially a specific "enforcement of the plan of reorganization (of the rail-*

"*road) embodied in the agreement,* to which nearly all "the bondholders subscribed, by issuing to the complain- "ant first mortgage bonds of the company to which the "railroad property was transferred in exchange for those "already held by him. *The bill, however, contains the "general prayer for relief; and under that prayer, as the "rule seems to be well settled in this state, the decree ren- "dered was proper.*"

(e) Duckett v. Duckett, 71 Md. 357.

It was held in this case that, "*Compensation for im- "provements may be decreed under a prayer for specific "performance and general relief* where the bill alleges "the making of such improvements in reliance upon a "parol gift."

(f) Green v. Drummond, 31 Md. p. 71.

We quote from the syllabi of this case which give the facts clearly as follows:

"The real estate of a testatrix was sold by her execu- "tors to certain persons who transferred their rights as "purchasers to D. The latter was accepted as a pur- "chaser by the executors and reported as such to the Or- "phans' Court, and the sale as so reported was ratified "by the court. The purchase was in fact made by D and "G jointly under an oral agreement between them that "each was to furnish one-half of the purchase money, "and to hold the property in individual moieties. G was "not a party to the contract with the executors, nor in "any manner known to them as purchaser."

We quote from the opinion in this case, page 85, as follows:

"Under this purchase the cash payment of $10,000 "was paid to the executors, and a considerable part of "said sum was furnished by G. At the time of the pur- "chase D and G were each tenants respectively of por- "tions of the property purchased and each remained in "possession of the same afterwards. Before the whole "purchase money was paid D died. On a bill filed by G "for an injunction to restrain the executors from execut- "ing a deed for said property to the heirs of D and to "restrain said heirs from accepting such deed and to re- "strain the administratrix of D from collecting the rents "of said property and for a receiver to collect said rents, *"and praying also G might be declared the owner of an "undivided moicty of the said property upon payment by "him of his proportion of the residue of said purchase "money.* Held:

"1st. That the complainant was not entitled to claim "a specific execution of the agreement between D and "himself, that he should become a joint purchaser of the "property and hold to the extent of one moiety.

"2nd. That the complainant was not entitled to re- "lief upon the ground of a resulting or constructive trust "in the property under the 8th section of the statute of "frauds, while the contract of purchase remained execu- "tory and before the conveyance of the legal estate to D.

"3rd. *That the court had jurisdiction and power to "grant relief to the complainant by decreeing compensa- "tion."*

(g) 20 Ency. of Pld. & Prac. 511, states:

"Under a prayer for specific performance and general

"relief the court may mould its decree according to the "circumstances as they appear at the hearing. Where "the special prayer which the plaintiff inserts is for spe- "cific performance and a prayer for general relief is "coupled with it, other relief may be granted under the "general prayer, whether the special prayer is allowed "or disallowed. Thus it has been held that under the "prayer for general relief a decree for the *payment of "money may be granted* and a lien secured by which the "contract may be declared and enforced. So under the "prayer for general relief the court may in its decree *"protect the plaintiff against the dower interest of the "defendant's wife. A decree rescinding the contract and "awarding compensation to the complainant may be "granted under the general prayer."*

(h) Warvelle on Vendors, section 963, states:

"In suits for specific performance where for some rea- "son performance becomes impracticable, equity may re- "tain the bill and grant *compensation.*"

After reviewing such an array of authorities, can any one for a moment doubt that the lower court rightfully acquired jurisdiction of this case and rightfully retained jurisdiction in order to carry out the principles of equity and to do complete justice as between the parties?

(i) Judge Caldwell in voicing the opinion of the United States Circuit Court of Appeals in the case of Raymond v. San Gabriel Valley L. Etc. Co., 53 Fed. Rep. 883, states:

"Whenever the purchaser has a right to go into equity "and compel the execution and delivery of a deed, the

"principle of mutuality gives the vendor the right to go "into equity to compel the vendee to perform the contract "on his part by paying the purchase money. *This is an "exception to the general rule that equity will decline "jurisdiction of a suit for a money consideration which "could be recovered by an action at law.* The exception "is based on the established doctrine of equity that the "right to a specific performance must be mutual, and that "it must be enjoyed alike by both parties to every con- "tract to which the jurisdiction extends."

(j) Appellant contends in his brief, by the persistency of the complainant in its wrongful suit, the defendant Clark has been put to expense amounting to several thousand dollars and if the complainant now suffers any injury by having this case dismissed after its legal action for damages is barred by limitation, it comes in poor grace for the defendant to complain.

We might answer this *strong* argument by saying that the defendant could have saved himself much worry and all of said expense *by paying the complainant the just debt which he owed* before this suit was filed. We do not believe that this court will require the complainant to dismiss its cause of action, because there was some *doubt* in the maintenance of the suit in the first instance. This defense of *doubt* and *ambiguity* would never have been adjudicated and sustained had not the defendant raised the point in his answer and made the same an issue of fact in this case. Two of the greatest judges in the land by their decisions on this point have arrived at contrary conclusions.

Judge Morrow held that complainant could maintain

its suit for specific performance in overruling the demurrer and sustaining the amended bill. The complainant thus had the assurance of one of the greatest jurists that *its cause of action was just and equitable and that the complainant was entitled to the equitable remedy of specific performance.*

Now, after being thus assured and lulled into security by the action of this most imminent jurist, and complainant's legal action having been since barred by statute of limitation, we submit *it would be most inequitable and unjust to have said bill dismissed and to say to the complainant that it has no remedy whatever; that although it has acted in good faith and spent six years' time in this litigation and thousands of dollars in preparing and prosecuting said action, it has wrongfully slept on its rights.* We submit it is now entitled at least to recover the damages agreed upon by the parties by the terms of the contract, and which the defendant agreed to pay complainant in the event he breached his contract.

Counsel for appellant in their brief state that the officers and attorneys for the complainant knew complainant was not entitled to the specific performance of the contract when this suit was instituted. We do not believe that the distinguished counsel will ever be able to convince this court that this statement is correct. The officers and attorneys for complainant evidently did not file this suit for *glory,* but they filed it in *good faith* feeling certain that they had a good cause of action for specific performance of the contract. As evidence of the correctness of our contention of this important question, we will say that notwithstanding the ability and learning

of counsel for the defendant displayed in the preparation of their brief in this case in the lower court, one of the strongest ever filed in any case, and notwithstanding their able argument and brief on the demurrer in the case before Judge Morrow, counsel for the complainant succeeded in convincing said two eminent jurists that the bill of complaint was filed in *good faith* and set forth a just cause of action and it was also held by Judge Morrow that the demurrer interposed by counsel for defendant to the cause for specific performance set forth in the bill was altogether without merit and the same was promptly overruled.

II.

Appellant's second assignment of error urged with such earnestness and zeal is but a corollary to appellant's first proposition and that is, if the court had no jurisdiction of the case, then the case should be dismissed.

Counsel for appellant in their brief in support of the above proposition cite and quote at length from and comment upon about forty cases which hold in effect that when an action is brought in a court of equity and it is shown from the bill that the complainant had a full, adequate and complete remedy at law, then the bill should be promptly dismissed and relegated to a court of law for trial and disposition.

We have examined a number of these cases and find, so far as we have examined, they were not *suits for specific performance of a contract for the sale of land,* but were for the recovery of possession of real or personal

property or upon a demand for money, to quiet title to property, etc. We submit, therefore, that said cases are wholly inapplicable to the case at bar, and therefore should not be considered.

We submit the following as a correct proposition:

Although a contract for the sale of land may give to the complainant a complete and adequate legal remedy, yet, for this reason, an action for the specific performance of such contract will not be denied by a court of equity.

The authorities almost to a unit hold that if it was the intention of the parties in making the contract that such contract should be carried out, then, if the contract is breached, a court will enforce the specific performance of the same, notwithstanding there may be a provision for payment of liquidated damages for the breach.

Unless there is an option given in the contract to the parties who breached the same to either perform the contract or in the alternative to pay damages then the contract is enforcible.

The complainant in this case by the terms of the contract had the option of bringing suit for specific performance or a suit for damages for a breach of the contract. Clark, Sizer and Whitmore, however, after they breached this contract and failed to pay the $400,000 purchase price, had no such option.

Without further comment we give below a few leading authorities which are so clear and explicit on this question that there can be no room for argument as to complainant's rights in the premises.

Cathcart *et al.* v. Robinson, 5 Pet. 264; (8 L. 120);

O'Connor v. Tyrell, N. J. Eq., 30 Atl. Rep. 1061;
Hull v. Sturdivant, 46 Me. 34;
Dooley v. Watson, 1 Gray (Mass.) 414;
Hocker v. Pynchan, 8 Gray. (Mass.) 550;
Diamond Match Co. v. Roeber, 106 N. Y. 473; 13 N. E. 423;
Ropes v. Upton, 125 Mass. 258;
Ewing *et al.* v. Gordon, 49 N. H. 455;
Ayrers v. Robbins, 30 Grat. 115;
Stewarts v. Bedell, 79 Pa. St. 336;
Gray v. Crosby, 18 Johns N. Y. 219;
Thornburgh v. Fish, 11 Mont. 53; 28 Pac. 381;
Ensign v. Kellogg, 4 Pick. (Mass.) 1;
Lyman v. Gedney, 114 Ill. 338; 29 N. E. 282;
Hodges v. Howing, 58 Conn. 12; 18 Atl. 979;
Gartrell v. Strafford, 12 Neb. 545; 11 M. W. 732;
Hemming v. Zimmerschitte, 4 Tex. 159;
Watterman on Spec. Perf., Sec. 22;
Fry on Spec. Perf., Sec. 121;
1 Suth. on Dam., pp. 90, 471.

The next case cited is a leading case on the question under discussion, and reviews more extensively the English as well as the American authorities than any we have read, to-wit:

1. Crane v. Peer, 43 N. J. Eq., 453; 4 Atl. 72.

In this case the Supreme Court of New Jersey states:

"Where a party to an agreement insists on a payment "of stipulated damages as a discharge, it must appear "that the damages stipulated are in lieu of a performance

"of the contract, the payment of which damages is an "alternative for his election.

"The contract must affirmatively show that the party "bound can pay the damages at his own election and thus "discharge the contract."

2. Lyman v. Gedney, 114 Ill. 388; 29 N. E. 282.

This suit was for the specific performance of a written agreement to exchange and convey certain real estate signed by the vendor and vendee. The contract also contained the following stipulation:

"Gedney and Lyman bind themselves in the sum of "$1000 as liquidated damages, to fulfill above agree- "ment." The court decreed a specific performance of the contract and the case was appealed to the Supreme Court, which states:

"Counsel for appellant argue that the clause in the in- "strument written in pencil, whereby each party binds "himself to the other in the sum of $1000, liquidated dam- "ages, limits the rights of the parties, upon a breach of "the contract, in equity as well as at law, and that the "only remedy is through the action of law for that sum. "The mere fact that a contract stipulates for the payment "of liquidated damages in case of failure to perform does "not prevent a court of equity from decreeing specific "performance. (Fry Spec. Perf., 67 *et seq;* Wat. Spec. Perf., 22 Pom. Cont. 40.)

"It is only where the contract *stipulates for one of two "things in the alternative—the performance of certain "acts or the payment of a certain amount of money in "lieu thereof—that equity will not decree a specific per-*

"formance of the first alternative." (Pom. Cont. *ubi supra;* Wat. Spec. Perf. 22, 23; Dooley v. Watson, 1 Gray 414.)

We cite the above authorities to show that the numerous authorities cited by appellant under his second assignment of error are inapplicable to this case.

The appellant contends that the action of complainant for the $100,000 liquidated damages is *in the nature of a suit on a promissory note for the payment of a certain amount of money.* This is correct so far as the obligation to pay a fixed amount is concerned, but it is given as an *alternative remedy* to the equitable remedy of specific performance, to be executed only at the option of complainant.

Appellant contends that he has been *wrongly treated* and *outraged* because the lower court, after taking jurisdiction of the case, and denying plaintiff the equitable demand sought, proceeded and rendered judgment for liquidated damages and that defendant was thus deprived of a trial on the issues of *fact by a jury of his country.*

We do not believe that appellant would be disposed to pay any just claim from the unreasonable contentions made by him. Appellant tried his case and lost it and of course he would like to have a new trial and submit the issues in the case to a jury or to any other tribunal on earth, except the U. S. Circuit Court, for he doubtless feels deep down in his heart there is little hope for him there.

Appellant cites the case of Cathcart v. Robinson and devotes a number of pages in his brief in criticising the same in an effort to twist said case out of joint so that

the case could not be recognized; and has endeavored to make that case, which is so analogous to this, appear inapplicable in every way to the facts in this case.

Appellant contends that inasmuch as the complainant did not sue for the liquidated demand in its amended bill it was not entitled to recover any damages. He contends that there was no suit for *the penalty* and *hence* the court erred in awarding judgment for *the penalty* counsel evidently refer to the *stipulation for liquidated damages* set forth in section 8 of the contract.

A penalty or a forfeiture in the strict sense of the term cannot be recovered in any court either of law or equity. This is the common law on this subject and is so elementary that no citation of authority is needed. This principle of the common law has been enacted into statutory law in this state. See Code of Civil Procedure 3369.

We do not believe that the statutes or Codes of California govern this case in any particular, because the contract provides that it shall be executed and the money paid at the city of Fort Worth, in the state of Texas.

Counsel for appellant has cited many sections of the Codes of California in regard to the assessment of damages in case of breaches of contract, but we most respectfully submit that none of them are applicable to this case even if the case was tried on the law side of the docket of the lower court.

Said contract was executed in the state of Texas and said money, according to the terms of said contract, is payable in Texas, and said contract is therefore solvable in said state. As to the correctness of this position, we cite the following authorities:

Andrews *et al.* v. Peoples B. & L. Assn., 94 Fed. Rep. 575; by C. C. A.;
Andrews v. Pond, 13 Pet. 65;
Miller v. Tiffany, 68 U. S. 540;
Peyton v. Heinekin, 80 U. S. 680;
Nickles v. Assn., 25 S. E. R. 8;
Assn. v. Reed, 93 N. Y. 470;
Dugen v. Lewis, 79 Tex. 249.

As the appellant has cited so many provisions of the Codes of California, we beg leave to quote from the Civil Code of said state which simply enact and epitomize the well-established principles of equity as follows:

C. C. P., section 3387, is as follows:

"It is to be presumed that the breach of an agreement "to transfer real property cannot be adequately relieved "by pecuniary compensation, and that the breach of an "agreement to transfer personal property can be thus re-"lieved."

C. C. P., section 3389, is as follows:

"A contract otherwise proper to be specifically en-"forced may be thus enforced, *though a penalty is im-"posed, or the damages are liquidated for its breach, and "the party in default is willing to pay the same.*"

C. C. P., section 1671, is as follows:

"The parties to a contract may agree therein upon an "amount which shall be presumed to be the amount of "damage sustained by a breach thereof, *when, from the "nature of the case, it would be impracticable or ex- "tremely difficult to fix the actual damage."*

Even if these sections of the Code were applicable we do not believe they would change the result of this case in any way, because the parties have stipulated that the reason they fixed the damages at $100,000 in the event of the breach of the contract by the defendants, is, quoting from section 8 of said contract: *"The object of this "clause of this contract is to make the measure of dam- "ages certain whereas, without such stipulation, by rea- "son of the peculiar character of the property and the "situation and surroundings of the parties, it will be im- "possible to arrive at any just and correct measure of "damages by proof in a court of law."*

Said section 1671, C. C. P., provides that the parties may stipulate for damages in the case of a breach of the contract of this character, "When, from the nature of "the case it would be impracticable or extremely difficult "to fix the actual damage." The parties to said contract have stated clearly and emphatically in said paragraph 8 of the contract that it would be impracticable as well as extremely difficult to fix the actual damages by reason of the peculiar character of the property and situation and surroundings of the parties.

Appellant contends "That the Cathcart case stands "alone and is *supported solely because the defendant in*

"equity claimed the right to pay the contractual penalty. "The court took his version of the contract and enforced "it in a suit which the plaintiff had a right to maintain."

We submit that *defendant in the Cathcart case did not claim the right to pay the contractual penalty* and did not offer to pay the contractual penalty, but simply set up in his answer that there was such a provision in the contract to pay a penalty of $1000 in the event of a breach of the contract by the defendant, because the Supreme Court states that counsel for Cathcart, the appellant in the case, *"argued that if the penalty only could "be decreed, this bill ought to be dismissed because the "penalty might have been recovered at law."*

So Cathcart the defendant in that case acted precisely like the defendant Charles W. Clark in this case. He states that there was a provision for the payment of liquidated damages for the breach of the contract by the defendant in order to defeat a recovery in the action for equitable relief, *but never at any time offered to pay the $100,000 as liquidated damages for the breach of the contract.* Counsel for Cathcart only referred to said paragraph of the contract in regard to the penalty in order to defeat the suit in equity. Counsel for the defendant in this case, just as counsel for Cathcart in that case, argued to the court most earnestly and strenuously "that the penalty only could be decreed and for this rea- "son complainant's bill ought to be dismissed because "the $100,000 penalty might have been recovered at "law."

The Supreme Court in the Cathcart case in answer to

such argument made by counsel for Cathcart states: (And we think this will doubtless be the answer of this Honorable Court to the argument of opposing counsel), *"We do not think so* (that is, that the case should be "dismissed). *The right of a vendor to come into a court "of equity to enforce a specific performance is unques- "tionable. Such subjects are within the settled and com- "mon jurisdiction of the court. It is clearly well set- "tled that if the jurisdiction attaches, the court will go "on to do complete justice, although in its progress it "may decree on a matter which was cognizable at law."*

"Mr. Robinson could not have sued for the penalty at "law without abandoning his right to enforce the con- "tract of sale; he could not be required or expected to "do this. Consequently, he came properly into a court "of equity and the court ought to do him justice. It "ought to direct Mr. Cathcart to pay that which he says "was to be according to his understanding, a substitute "for the principal subject of the contract."

Every word of the above quotation is applicable to the case at bar.

Complainant felt sure that it could maintain its action for specific performance of the contract. So did Mr. Robinson. Mr. Robinson could not have sued for the penalty at law without abandoning his right to enforce the contract of sale, neither could the complainant. Mr. Robinson could not be expected or required to do this. Neither could complainant.

Consequently, Mr. Robinson came properly into a court of equity and the court did do him justice. The

complainant, likewise, came properly into a court of equity and we submit the court ought to do it justice.

The Supreme Court stated: "It ought to direct Mr. "Cathcart to pay that which he says was to be, accord- "ing to his understanding, a substitute for the principal "subject of the contract."

We say the court ought to, and that it doubtless will direct Mr. Charles W. Clark to pay that which he says was to be, according to his understanding, a substitute for the principal subject of the contract.

Judge Dietrich in his opinion says: "Can it be said "with any decree of certainty, that Clark would have "signed this contract if it had contained the stipulation "providing, at the election of complainant, the specified "damages could be waived and he would be required to "pay the full purchase price of $400,000? The *apparent* "meaning of the instrument is that in case of a refusal "to purchase the only remedy against the defendant is "one for damages. This is the *probable* construction "which Clark, Sizer and Whitmore gave to it."

Appellant states in his answer and his counsel state in their brief that Mr. Clark never would have signed the contract if he knew that he would be compelled to pay the $400,000. Counsel in their brief in this case in the lower court, after quoting paragraph 8 of the contract and referring to said paragraph, state:

"After (the contracts) providing for liquidated dam- "ages ($100,000) in the event of a breach in favor of the "complainant, the contracts make a similar provision in "favor of the defendants" and for this reason, the

learned counsel for defendant Clark asks this case to be dismissed.

They contend that if the decree rendered in the lower court is not reversed, it will work a great hardship upon the defendant and would be inequitable, because at the time he signed the contract he did not understand the force and effect of the obligation. He did not understand that he was to pay complainant the purchase price for the mine, to-wit, $400,000, and he did not understand that in the event he breached the contract he would be liable for the damages which had been agreed upon between complainant and defendant Clark, to-wit, $100,000.

Now, in answer to this, we assert that defendant Clark was 21 years of age and able to read and write and his contention that he did not understand the obligation he was signing is child's play.

Judge Dietrich in his decree in the lower court states that defendant Charles W. Clark at the time of the execution of the contract

"Was a man of intelligence and of experience in large "business transactions. He had lived many years in a "mining community and was not only acquainted with "the practical operation of mines but also had an inti- "mate knowledge of commerce and mining property. "There is no evidence that he was of a *peculiarly artless* "or *unsuspecting* disposition. It is not, therefore, a case "where the assistance of a court of equity may be in- "voked to protect *the ignorant, the weak,* or *the over- "credulous one against an unconscionable obligation "which he has been induced to assume by his stronger*

"and more artful opponent. Evidently the parties ne-"gotiated with each other on an equal basis." [Transcript, pp. 138-9.]

Appellant contends that if this court does not reverse said decree rendered against him, *"it will subvert "justice."*

Appellant evidently has queer ideas of justice. If the defendant did not know the force and effect of a simple obligation on his part to pay a certain amount of money as provided by the contract, he should be taught the force and effiicacy of contracts and we suggest that it is never too late to learn. It will be a good and wholesome lesson to the defendant to let him know that he is bound by the laws of his country as any other citizen or ordinary individual, and we do not believe the court will make an exception in the present instance of Mr. Clark.

Appellant states in his brief, p. 44, as follows:

"In discussing the appellant's right to a jury trial on "the issue of fraud, no attack is made here upon the con-"clusion of the lower court based on the conflict of evi-"dence on that subject, that the evidence was conflict-"ing and fraught with no little degree of doubt appears "from the reading of that portion of the opinion filed "below which dealt with the evidence on this issue."

And just following this statement appellant again states in his brief: "But who can be sure that the very "niceties of ambiguous speech which the ordinary man "would stamp as the badge of fraud, were not those that "should satisfy a single judge that the complainant's

"officers and agents had not made actual misrepresenta-
"tions."

We submit that the appellant can not, after stating that the conclusions of fact of the lower court in his opinion, are true and correct, then ask for a rehearing of this case in order that he might again have a chance of trying the case before a jury. We suggest that appellant is occupying the position of the drowning man, that he is grasping at every imaginary straw that comes his way.

If the lower court in the first instance had jurisdiction of the case to pass upon the questions of fraud, mutuality, uncertainty, and ambiguity of the bill, then unquestionably, it had a right to do full and complete justice to the parties by rendering a decree for the liquidated damages which had been agreed upon.

Appellant in his brief cites the case of Morgan v. Bell, 3rd Wash. 554; 28 Pac. 925.

That case has no application whatever to this case, because the Supreme Court of Washington held in that case "It was plainly an action brought in the equity court *"to avoid the assessment of damages by the jury* where "the equitable action must of necessity fail and not that "the damages were incident to the failure." The vendor in that case did not own and therefore could not convey the land he contracted to convey.

So the court properly held in that case that the suit for specific performance by the vendee was not brought in good faith because he knew it was impossible to enforce the contract and knew the only action he had in that case was an action at law for the breach of the con-

tract and *the right to recover damages was not incident to the failure of the complainant to recover on his equitable action.* Hence, the court held that action of specific performance was not brought in *good faith.*

Counsel for appellant also refers in his brief to the case of Konnerup v. Frandsen, *et ux.*, 36 Pac. (Wash.) 493.

This was also an action by the plaintiff for the specific performance of a contract for the sale of land.

The lower court in trying this case, decided that the plaintiff could not recover and the bill was dismissed and the complainant appealed the case to the Supreme Court.

Counsel for the defendant in the case contended that under the rule laid down in the case of Morgan v. Bell, inasmuch as the complaint *sets forth the contract upon which the cause of action is based and prays that provided specific performance of the contract cannot be had, plaintiff be compensated in damages, the court has no jurisdiction of the case* for the reason that the only basis upon which a court of equity can take jurisdiction of the action for specific performance is that there is no adequate remedy at law.

The Supreme Court held:

"No such principle as is discussed in Morgan v. Bell "is involved in this case. It is true that the prayer con- "cludes that if it shall appear that the defendants had "no sufficient title and therefore cannot convey said "lands, and the whole thereof to plaintiff, and could not "at the time of the commencement of this action or if "for any other cause the first relief herein prayed for

"cannot be had, then the plaintiff have judgment "against said defendants and each one and both of them "for $600 damages and costs.

"But that cannot be considered further than as a pre- "cautionary application for relief by way of damages in "case the defendants had wrongfully disposed of the "title to said land after plaintiff's right to the specific "performance had accrued, which under all the authori- "ties would be a relief to which he was entitled in an "action for specific performance.

"*Testimony should be allowed to be introduced under "the allegations of the complaint and the denials of the "answer and reply; and if, in the opinion of the court, "the allegations of the complaint are sustained, the ap- "pellant will be entitled to a judgment as prayed for.* "The judgment of the court in dismissing the action will "therefore be reversed and the cause remanded with "instructions to proceed in accordance with this "opinion."

This case we respectfully submit does not in any way militate against the case at bar, but to the contrary strongly supports the same, and we are thankful for counsel for appellant for referring us to this most important case.

Under the above assignment of error, we will refer the court to one other case to-wit:

Holland v. Anderson, 38 Mo. 55.

We quote from the opinion in this case, as follows:

"This was a suit in the nature of a bill in equity for "rescission and cancellation of a contract in respect of

"an exchange of lands. The petition asked for rescind-
"ing the contract and also prayed for *general relief,* but
"it was admitted on argument that the prayer for rescis-
"sion *could not be granted because the property had*
"been changed in such a manner that it was impossible
"to have it restored. But it is contended that although
"that part of the bill failed, the court should still have
"awarded the plaintiff compensation under the prayer
"for general relief.

"Judge Story says that the usual course is for the
"plaintiff in this part of the bill to make a special prayer
"for the particular relief to which he thinks himself
"entitled and then to conclude with a prayer for general
"relief at the discretion of the court. The latter can
"never be properly and safely omitted; because if the
"plaintiff should mistake the relief to which he is entitled
"in his special prayer, the court may yet afford him the
"relief to which he has a right under the prayer of gen-
"eral relief.

"Story Eq. Plead. Sec. 40.

"It is a well established rule that where a court of
"equity once acquires jurisdiction of a cause, it will
"retain it to do full and complete justice. It will some-
"times give damages which are generally only recover-
"able at law in lieu of equitable relief where it has ob-
"tained jurisdiction on other grounds.

"We entertain no doubt about the petition being suffi-
"cient *under the general relief clause to enable the plain-*
"tiff to obtain compensation, providing the evidence
"made out a case showing he was entitled to such relief."

Could anyone possibly find stronger language to support the case at bar than the language used by the Supreme Court of Missouri in the Holland case?

In all the numerous cases for specific performance for the sale of land where a court of equity once acquires jurisdiction of the case and if for any reason developed by the evidence in the case, the complainant is unable to maintain his suit for specific performance, the courts hold it is the duty of the trial court to retain jurisdiction of the case and to do full and complete justice and to award damages to the complainant for the breach of the contract, which could only be recoverable in a court of law, if complainant is entitled to such relief by reason of the breach of his contract.

We most respectfully submit that complainant's bill in the present case alleges a just and equitable cause of action as decided by Judge Morrow.

At the trial of this cause on the facts Judge Dietrich after hearing all the evidence in regard to the uncertainty of the meaning and the ambiguity of the contract by reason of paragraph 8 thereof, held that plaintiff was not entitled to the equitable relief prayed for *but was entitled to damages in lieu of the equitable relief* and we submit properly retained jurisdiction of this case to do full and complete justice between the parties. For after due consideration of all the parties to the contract they estimated, agreed upon, fixed and liquidated the damages that would necessarily result from the breach of the contract at $100,000.00.

III.

Defective Title. --- Defendant Bound by the Terms of the Contract.

We submit that the opinion by the United States Circuit Court in this case, rendered by Judge Dietrich, has correctly and effectually disposed of the defense in regard to the alleged defects in the title to the property in question. The opinion is as follows:

"*Complainant's Title.* In view of the conclusion "that the contract is a valid obligation, the con- "tention that complainant's title is defective "may be summarily disposed of. The defendants "were to receive from complainant only 'the "titles which the first party (complainant), "through its directors or otherwise, has,' * * * "'said titles having been examined by the second "parties, it is agreed that the same are good and "sufficient.' Such is the express language of "the contract. And by it, the same as by any "other provision, the parties are bound." [Transcript, p. 159.]

Inasmuch as the lower court found and decreed the contract in question to be a valid and binding contract, and counsel for appellant in their brief acquiesce in this finding of fact and decree, then the defendant must necessarily be governed by the terms of the contract in regard to the character of the title which was to be conveyed by complainant to defendant Clark and his associates.

There will be no necessity whatever for the court

to investigate the titles of appellee to the property in question, *because this question is conclusively and effectively settled by the contract in question, which only obligates the appellee to transfer and cause to be transferred to appellant and his associates whatever "titles to the property are held by its directors or other-"wise."*

EVEN IF COMPLAINANT'S TITLES TO THE PROPERTY ARE DEFECTIVE, UNDER THE CONTRACT, THE APPELLANT AND HIS ASSOCIATES WAIVED SUCH DEFECTS, AND APPELLEE IS ONLY OBLIGATED TO TRANSFER WHATEVER TITLE IT AND ITS DIRECTORS HAD IN AND TO THE PROPERTY, ACCORDING TO THE TERMS OF THE CONTRACT IN SUIT.

The evidence shows that appellant and his associates, Sizer and Whitmore, employed an eminent Mexican lawyer Manuel Prieto, to examine the title to all the property in question, and that all the plaintiff's title papers were delivered to Sizer; and said lawyer [see depositions of Sizer, Tr. p. 388] rendered two opinions upon such title (see exhibits "E" [Tr. p. 478] and "F" [Tr. p. 464] of Sizer's deposition), wherein he pointed out, in the first opinion (exhibit "F") several defects which were cured by the appellee, and, thereafter, on the 11th day of May, 1901, said lawyer rendered another opinion (exhibit "E") on the titles to the property in question, for appellant Clark and his associates, wherein he states the defects in the titles to the property in question had been corrected and were good, subject to several minor irregularities therein specified. There-

after, on, to-wit, the first day of May, 1902, the contract in question was executed.

The contract sued upon states:

"Whereas, the said second parties, Clark, Sizer and "Whitmore, have, after examination of said property "and the titles thereto, notified the first party (appellee) "that the second parties are satisfied with the titles to "said property in the first party." * * *

"The first party concurrently, or as near as may be "with such payment (of the $400,000), to cause to be "transferred to the second parties *the titles which the "first party, through its directors or otherwise, has "in and to said property. Said titles (to all the property "in question) having been examined by the second par- "ties, it is agreed that the same are good and sufficient."*

Ben J. Tillar, a director of appellee, in his depositions, states:

"All of the title papers to these properties owned by "the Rosario Mining and Milling Company were de- "livered to Frank L. Sizer, who was one of the parties "to the contract of May 1st, 1902, and acting for him- "self, C. W. Clark and Edward L. Whitmore, Mr. Sizer "had these papers examined by a prominent attorney "who resided in the city of Chihuahua, state of Chihua- "hua, Republic of Mexico, whose name was Manuel "Prieto, and said attorney reported that the titles were "good and sufficient and were accepted and received as "such by Mr. Sizer and his associates. I heard Mr. "Sizer say, on several occasions, that the titles were "satisfactory to himself and to his associates. These

"titles were examined prior to the execution of the con-"tract dated May 1st, 1902, and they reported to us that "the titles were satisfactory and acceptable to them, "and hence said provision was incorporated in our con-"tract with them, dated May 1st, 1902." [Transcript, p. 275.]

Witness Peacock testifies substantially the same as Mr. Tillar on this point. [Transcript, pp. 172-238.]

Appellant Clark testified substantially that Sizer was his general manager, and was in full charge of the mines, examining and experting the same, and had authority to investigate the titles to the property and to employ a lawyer to pass upon the same; that said two written opinions of Manuel Prieto (exhibits "E" and "F" attached to Sizer's deposition) were sent to him by Sizer prior to the execution of the contract sued upon, but he did not examine the same. He referred all such matters to Edward L. Whitmore, who was his confidential man at that time, and that Whitmore received and opened all of his mail. If Clark did not examine the same it was his own fault and negligence. He left said matter to Sizer and Whitmore. He did talk with Whitmore about the titles. [Transcript, pp. 588-621.]

In the specific performance of contracts, a purchaser is only entitled to such interest in the property as his contract calls for.

Brashier v. Gratz, *et al.*, 6 Wheat, 529;
Maxfield v. Bierbauer, 8 Minn. . . ;
Pomeroy on Spec. Perf. Cont., Sec. 341.

ARGUMENT.

The evidence shows that appellee acted in good faith with Mr. Clark and that all the title papers to the property held by the appellee were delivered by the appellee to his agent F. L. Sizer. Clark says Sizer was in charge of the mines for him, that he had authority to investigate the titles to the property and to employ lawyers to pass on the same. The evidence shows that Sizer employed an eminent Mexican attorney, Manuel Prieto, to examine the title to the property, and who, in fact, did make a thorough examination of the same, and rendered for Clark and his associates said two written opinions on the same. In the first opinion, exhibit "F" [Tr. p. 464] he reviews critically the title papers and points out some irregularities in the title, and there were some corrections made by the complainant in the titles, and thereafter, on the 11th day of May, 1901, said attorney renders Mr. Clark and his associates another written opinion, exhibit "E" on the title to the property, in which he states the execution of the three deeds hereinafter referred to by the three daughters of Mr. and Mrs. McKamy cured the defect now complained of by appellant as to the McKamy heirs, and stated some irregularities still existing in the titles.

After Mr. Clark and his associates as aforesaid had ample opportunity to make and did make a full investigation of the titles to the property in question, the contract sued on was executed on May 1st, 1902.

By the terms of said contract we find the Rosario Mining and Milling Company only agreed and obligated itself *to transfer and "to cause to be transferred to the*

"second parties the titles (to said property) which the "first party, through its directors or otherwise has in "and to said property."

The titles to the property had been examined by Mr. Clark and his associates and they found the legal titles to some of the property were held by the directors (Walker, Tillar and Peacock) in trust for complainant company, and the title to the remainder of the property was held by the company; but it is stated in the second paragraph of the contract that "the first party is the owner of the mine and mining property" (describing all of the property). The purchasers, Clark, Sizer and Whitmore express themselves as being satisfied with the title to the property after it was examined, as aforesaid, though it appears from the opinions of their attorney, there were still some defects in the same.

Whatever title to the property held by the company or its directors is simply to be transferred to Mr. Clark and his associates. It matters not whether said title is good, bad or indifferent, the contract only provides that the same should be transferred to the purchasers, *not by a warranty deed,* but by a deed without a warranty, or rather by a quit claim deed. *The company is not obligated to convey the land, but simply to transfer what title it may have to the land.*

Then we submit the contract is fully satisfied if the company transfers *the titles* to the property *which are held by it or its directors,* however defective they may be by a *quit claim deed* or a *deed without a warranty.*

And where "it appears from the contract itself that "the parties had in view merely such a conveyance as

"would *pass all the title which the vendor had, whether "defective or not,* that is all the vendee can insist on."

Thompson v. Hawley, 14 Oregon 199.

When the defects of the title are known to the vendor, or even when he knows the title is defective in some manner but the nature and extent of the defects are unknown, and the vendor expressly sells such title only as he possesses without binding himself to convey a fee simple title or to warrant the title in any way, he may enforce his contract against the purchaser and compel the acceptance of whatever title is held by the vendor.

Winne v. Reynolds, 6 Paige (N. Y.) 407;
Blakemore v. Kimmons, 8 Baxt. (Tenn.) 470;
Leonard v. Woodruff, 23 Utah 494.

Pomeroy on Specific Performance of Contracts, section 341 states:

"Where the vendee agrees to purchase a title which "he knows to be defective, *or the interest, whatever it "may be, which the vendor has,* this contract will be en- "forced at the vendor's suit."

The evidence shows that both the two defects of title complained of were called to the attention of Clark by this Mexican lawyer [exhibits "F" and "E," Tr. pp. 464-478.]

Brasier v. Gratz *et al.,* 6 Wheat. 529.

In this case, Chief Justice Marshall, in delivering the opinion of the court, states:

"The contract stipulates that, after the payment of "the purchase money, *Gratz shall convey,* not the land

"or a good and sure title to it, but all his, the said "Michael Gratz's estate, right, title and interest, of and "in all the said residue of the above mentioned tract of "land. Gratz was able to make the conveyance which "he had contracted to make and which Brashier had "contracted to receive, and his want of legal title fur- "nished no excuse for the non-payment of the purchase "money."

First Alleged Defect of Title.

The bulk of the property in question was conveyed by a contract known as the Garcia contract August 4th, 1896, to Walker, Tillar and Peacock in trust for the complainant company, instead of directly to the company. The said Walker, Tillar and Peacock being directors of the company at said time, defendant in his answer alleges, and counsel contends, *that inasmuch as said Walker, Tillar and Peacock did not have a written power of attorney to act for the complainant company at said time,* that the absence of the power of attorney rendered the conveyance invalid. This instrument was executed before a notary by Tiburcio Garcia, William N. McKamy and A. W. Long as grantors, conveying the property to Walker, Tillar and Peacock in trust for the Rosario Mining & Milling Company. This contract is introduced in evidence, see exhibit "D" attached to the deposition of Boix. [Tr. pp. 743-762.]

At this time, as the evidence shows and as it is admitted, the directors of said company were five, consisting of J. A. Walker, Ben. J. Tillar, John A. Peacock, A. L. Matlock and W. N. McConnell. They are recited

to be such in complainant's charter [Tr. p. 196]. Now, a majority of the directors, Walker, Tillar and Peacock were present, representing the Rosario Mining & Milling Company, and signed said instrument in their capacity as directors of said company for said company in the protocolization of said instrument before the notary.

No power of attorney was necessary for a majority of the directors to represent the company.

The amended bill alleges the facts set forth in this Garcia conveyance, that the property was conveyed in trust to Walker, Tillar and Peacock for the complainant company by said grantors, because at that time the company had not filed its charter qualifying it for doing business in Mexico. [Tr. p. 4.] The supplemental bill of complainant alleges, after the bringing of this suit, that said property was conveyed to said complainant company by said Walker, Tillar and Peacock. [Tr. p. 40.] We have introduced a deed in this case, exhibit "F" duly executed by the said Walker, Tillar and Peacock and their respective wives conveying said property to the Rosario Mining & Milling Company [Tr. p. 263] (attached to Boix deposition). This deed as shown, has been properly protocolized and duly registered in Mexico where the said land is situated and no objection has been made to the same by the defendant.

Now even the good witness for defendant, Mr. Boix, in his deposition admits that article 1401 of the Civil Code of the state of Chihuahua, reads as follows:

"Article 1401 Civil Code.—Contracts made in the "name of another by a person who is not his legitimate "representative, shall be null, *unless the person in whose*

"name they were made shall ratify them before they "shall be retracted by the other party." [Tr. p. 672.]

This Civil Code, English edition, has been introduced in evidence in this case.

This witness also admits that article 189 and article 197 of the Commercial Code authorized "the directors "of corporations to carry into effect all of the operations "of the corporation and that the management of the "affairs of the corporation shall be done by its "directors." [Tr. 682-3.]

Also, Boix admits that "if said conveyance, *the "Garcia contract, exhibit "E," did not convey the title "to said property to the Rosario Mining & Milling "Company, the same was conveyed by said instrument "to Walker, Tillar and Peacock."* [Tr. p. 690.]

The witness Boix further testifies in his deposition as follows:

"Q. Then Mr. Boix, in view of the prescriptions of "the laws you have read, you may conclude that the con- "tract entered into between Tiburcio Garcia and the "Rosario Mining & Milling Company represented by "Messrs. Peacock, Walker and Tillar, was duly ratified "by said company by the fact of the payment by the said "company of the price in which the purchase was stipu- "lated. Is that so?

"A. Yes sir." [Tr. pp. 692-3.]

Said witness also testifies *that even if said Garcia instrument was null, yet, if the Rosario Mining & Mill- ing Company took possession of said property at the time of said conveyance and continually held the same in*

possession in good faith, believing that the property belonged to it and held continuous and peaceful possession of all of said property under said instrument for 10 years, then complainant's title to the property would be good by the statute of limitation under the Mexican laws. [Transcript pp. 702-3.]

We submit, from defendant's own witness it is conclusively shown that complainant's title to the property, of which they complain on account of Walker, Tillar and Peacock not having a power of attorney from the complainant company to purchase the property, is good, valid and marketable.

Felipe Seijas, the other Mexican lawyer, testified by deposition, as follows:

That under articles 15, 18, 32, 265, 266 and 267 Commercial Code of the state of Chihuahua, which is translated in English and introduced in evidence, a foreign corporation can acquire title to land in Mexico without protocolizing and registering its charter. [Tr. pp. 905-6-7.]

Said witness further states and gives his reason and quotes the law showing that the Garcia conveyance is good and binding on the parties, because Walker, Tillar and Peacock constituted a majority of the directors of the complainant company and had a right to act for the company in the purchase of the land and to bind the company. [Transcript, pp. 911-12.]

Said witness states that if for any reason *the title to the property was not conveyed by the Garcia instrument to the Rosario Mining and Milling Company, it was*

conveyed by said instrument to Walker, Tillar and Peacock. [Transcript, p. 912.]

The witness also testifies that under said Civil Code of the state of Chihuahua, articles 2352, 2354, 2220 and 2221 even if the directors had no authority for purchasing said property by the Garcia contract, yet by reason of the fact that the company took possession of the property and paid the balance of the purchase money $115,000, it thereby ratified the acts of its directors, Walker, Tillar and Peacock in the purchase of the property, and its title to the property was good. [Transcript, p. 914.]

This witness testified under articles 1080 and 1081 of the said Civil Code of the state of Chihuahua the Rosario Mining and Milling Company *acquired title to the property in question by the 10 years statute of limitation, as it had held peaceful continuous possession of the property under color of title for 10 years.* [Transcript, pp. 919-20.]

The witness, John A. Peacock, testified in his second deposition, that the Rosario Mining & Milling Company had held peaceful and continuous possession of said property from the date of said Garcia instrument up to the time he testified in December, 1907, in good faith, claiming said property under said conveyance. [Transcript, pp. 12-15.]

The witness Seijas testified furthermore that the statute of limitation under the Mexican laws would run against the state or municipality, the same as an individual and quotes the section of said code, providing such. [Transcript, pp. 921-2.]

Mr. Seijas also testified that the following is the man-

ner in which land is conveyed in the republic of Mexico, to-wit:

"So far as contracts of purchase and sale, such as we "call deeds, are concerned between parties, who are then "in Mexico, the two parties appear before the notary; "they make their bargain right then before the notary "and he writes that in the books which he calls the pro- "tocol; that is signed by the notary and by the parties "and by their witnesses, and when it has been decided in "that way, that becomes the original contract. He then "makes a copy of it (called testimonio) for each party, "and these copies he certifies to be correct; and they are "the ones that are afterwards carried to the registry "office and registered."

Said witness also states on the same page, that if a deed is duly executed according to the laws of any state of the United States where said instrument is made, conveying land in Mexico, the same will be valid, but that the instrument should be protocolized and registered in the following manner in Mexico: [Transcript, pp. 937-8.]

"Now in regard to documents made in this country "and which are valid in this country affecting lands in "Mexico, the documents after their regularity having "been certified to by the officers in this country, and the "seals and signatures of those officers having been cer- "tified by the Mexican authorities, are then presented to "the judge of the first instance (in Mexico) if they are "in English and he makes an order that they shall be "translated into Spanish. When the translation is made

"to his satisfaction, the Spanish translation is then sent "to the notary to be extended in full in his book of proto- "cols, and that has the same effect as an original docu- "ment made before him by the parties in Mexico." [Transcript, p. 938.]

After this, the laws of Mexico and the testimony of the two Mexican lawyers considered, we respectfully submit that the court can come to no conclusion other than that there is no defect whatever in complainant's title, so far as want of power of attorney to Walker, Tillar and Peacock in representing the complainant company, in the Garcia conveyance.

The supplemental bill and the evidence further shows that Walker, Tillar and Peacock, joined by their respective wives executed a deed conveying said property to complainant on the .... day of ....., 1904, and this deed has been properly protocolized and registered and is in evidence. [Transcript, p. 763.]

Second Alleged Defect of Title.

Complainant's amended bill states that complainant relies upon the stipulation in the contract which requires complainant *"to transfer only such titles to the "property as is held by it and its directors."* Complainant in no way admits any defects in its title. The defendant has devoted 40 pages of its second amended answer to alleging various and sundry defects in complainant's title to the property in question, *but said answer in no place either directly or indirectly alleges that the title to a large portion or any portion of said property is vested in the heirs of Letitia McKamy deceased,*

the wife of W. N. McKamy, and that therefore complainant has never acquired her title to, or interest in said property.

26 Am. & Eng. Enc. of Law, page 112;
Greenblatt v. Hermann, 144 N. Y. 13.

Three deeds have been introduced in evidence, executed by the three daughters (and their respective husbands) of W. N. McKamy and his said wife, Letitia McKamy, deceased. We submit that the defendant, Charles W. Clark, has failed to allege and prove that there are any other heirs of the said wife of W. N. McKamy, than the three daughters who executed said deeds; hence, the defendant has wholly failed to allege or prove there is any defective title to complainant's property by reason of the heirs of said W. N. McKamy's said wife.

Defendant having failed to make any allegations in his amended bill in regard thereto, cannot now, we submit, claim that there is a defect in complainant's title by reason of the fact that title to a portion of the property may have been vested in the wife of one W. N. McKamy or her heirs.

The defendant claims that if Mrs. McKamy wife of W. N. McKamy was dead at the time of the Garcia conveyance then her community interest in the property, that W. N. McKamy undertook to convey in the Garcia contract was vested in her heirs and that there has been no conveyance of the property by said heirs to the Rosario Mining and Milling Company.

There are three deeds introduced in evidence, at-

tached to the deposition of Boix, to-wit, exhibit "G" [Tr. pp. 785-795] executed by G. S. White and his wife H. B. White, exhibit "H" [Tr. pp. 795-807] executed by Letitia E. Swearington and her husband Henry S. Swearington and exhibit "I" [Tr. pp. 808-817] executed by A. W. Long and his wife Fanny Long, each of said three wives purporting to be the heirs of Letitia McKamy, deceased, wife of W. N. McKamy, joined by their husbands conveying said property in question to the Rosario Mining & Milling Company.

The testimony of John A. Peacock shows conclusively that H. B. White, Letitia A. Swearington and Fanny Long were the daughters of W. N. McKamy and his wife Letitia McKamy and the heirs of the latter. [Transcript, pp. 1217-1222.]

(1) **BURDEN OF PROOF.---Where the defect in a title tendered in a suit for specific performance of a contract depends upon some intrinsic facts not appearing on the record to justify a refusal to accept the title, the defendant must allege and prove such defects.**

The burden rests upon the defendant to allege and prove that there were other heirs of Letitia McKamy before they can show that there is any defect in the title in this particular. This they have not done. If the court should, perchance, find the evidence insufficient to prove said heirship, then we submit, *that the burden is likewise upon the defendant to allege and prove the specific defect in the title relied upon by him and he must both allege and prove that Letitia McKamy has children or other legal heirs than her surviving husband, W. N.*

McKamy, because he would, under the Mexican laws as well as under the laws of Texas and California, inherit her community interest in the property if there were no children.

We call the attention of the court to a leading authority cited above, as the same is directly in point on this question.

Greenblatt v. Hermann, 144 N. Y. 13.

In this case the vendee, the plaintiff, sued for specific performance of the contract in which he agreed to buy and the defendant agreed to sell a certain lot, provided the title was perfect and he sued also in the alternative, in a second count, to recover part of the purchase money paid and to recover damages because the title he alleged was defective. The defendant tendered to plaintiff a deed to the lot and plaintiff alleges he was ready and willing to pay the balance of the purchase money pursuant to the contract; *but objected to the title, because the record showed in the sale of the property in the* Nichols estate under the order of the Surrogate Court, certain persons, being "the heirs" of said Nichols were mentioned in the petition for said sale, whereas the law required "all the heirs" of the decedent should be designated in such petition and order of sale. The court held:

"But the vendee who refuses to take title upon the "ground of defect therein *must point out the objection "and give proof tending to establish it,* or to create such "a doubt in respect thereto as to render the title unmar- "ketable. The point, at least the title was doubtful, and "therefore unmarketable rests upon the *possible exist-*

"*ence of heirs* on the mother's side, not brought into the "proceeding. If their existence had been shown, or evi- "dence given rendering it probable that such heirs were "in being the plaintiff would have been entitled to re- "lief (damages). It has often been said that the pur- "chaser is entitled to a marketable title. The title tend- "ered need not be bad in order to relieve him from his "purchase; but it must be defective in fact, or so clouded "by apparent defects, either in the record or by proof "outside of the record, that prudent men knowing the "facts, would hesitate to take it. *In the present case "there is no presumption in the absence of proof that "the mother of the decedent had brothers or sisters or "decendants of either. The title is not doubtful by rea- "son of any fact shown or by reason of any inference "from such fact. It is a probability merely that such "heirs may exist, but the plaintiff (who sued in the al- "ternative for damages by reason of alleged defects in "the title) has not seen fit to give any proof on the sub- "ject and has left it to conjecture merely, and a suspi- "cion or conjecture, without any fact to support it, does "not raise a reasonable doubt as to the validity of a title "good upon the record. We think it would be in accord- "ance with equitable principles to permit the plaintiff "now to take the title tendered."*

And the contract was specifically enforced by the court and the plaintiff was required to pay the purchase money and take the property instead of obtaining a judgment for damages for the breach of the contract on account of defective title as he prayed for.

There is no comment necessary on this authority. The court states in the case, which is like the one at bar, that where a contract for specific performance is being enforced, "a vendee who refuses to take title upon the "ground of defect therein, *must point out his objection "(in his pleading) and give proof tending to estab-"lish it.*"

In the case at bar we submit, as held in the case cited, there is no presumption in the absence of proof that the deceased wife of W. N. McKamy had any other children than the three daughters or descendants of such. Title is not doubtful by reason of any fact shown or by reason of any inference from such fact. It is a probability merely; such may exist, but the defendant has not seen fit to give any proof on the subject and has left it to conjecture, and a suspicion, or conjecture without fact to support it, does not raise a reasonable doubt as to the validity of complainant's title.

Counsel for appellant on page 61 of their brief, refers to article 2061 of the Civil Code of Chihuahua which is as follows:

"A division of the 'ganancials' by halves by the con-"sorts or their heirs shall take place, whatever may be "the amount of the property which each of them may "have brought into or acquired during the marriage, "and notwithstanding that either or both may have "lacked property at the time of celebrating the mar-"riage."

Counsel in discussing these laws of the state of Chihuahua insist on this article of the code as being applicable to the case at bar.

We respectfully submit, that said article 2061 does not refer to the succession or inheritance of property upon the death of either of the spouses, but the same refers only to a division of the property upon separation of the husband and wife by agreement or where a divorce is granted. This may readily be seen by reading three or four articles of the code preceding said article 2061; hence we submit that said article 2061 and other articles relating to ganancials cannot be considered as applicable to the inheritance or succession of the community property of the deceased wife of W. N. McKamy.

We do not concede that the interest in the property in question standing in the name of McKamy was the community property under the Mexican law of W. N. McKamy and his deceased wife. It may have been his separate property and defendant should have introduced some proof on that subject; but, granting for sake of argument, that McKamy's interest in the property at the time of the Garcia conveyance was the community property of himself and his deceased wife, we respectfully submit that the doctrine laid down in Toland v. Earle, 129 Cal. 148, is not applicable to this case. That case is based upon the Code of California, which is not applicable to this case as the contract is to be performed in Texas. However, if the Code of California should govern this case, which is not conceded, we submit that section 1401 of the Civil Code of California also is applicable, which states as follows:

"Upon the death of the wife, the entire community "property *without administration belongs to the sur-*

"viving husband" regardless of whether or not there are any children.

Now there is no section of the Mexican Code quoted which differs from the above section quoted from the Civil Code of California. There is no proof in this case that Letitia McKamy, the deceased wife of W. N. McKamy, had any other children than the three daughters, or descendants of children, and there cannot be any presumptions indulged in in this matter in the absence of direct and positive proof on the subject adduced by the defendant.

The contract was to be performed in Texas, and under the Texas law, as under the laws of California, where there are no children, the husband inherits all of the community property and such property vests directly in the husband *without administration.*

See:

Gurley v. Ward, 37 Texas 20;
Greer v. Hugely, 23 Texas 539;
Wirtz on Succession, 111 La. 40.

The laws of Texas govern, for the contract is solveable, and in absence of direct proof of the laws of Mexico on this point they are presumed to be the same as the laws of Texas.

Evans v. Anderson, 78 Ill. 558.

This case states:

"It is a principle adopted everywhere, that the nature, "validity and interpretation of contracts, must be gov- "erned by the laws of the country where they are to be "performed."

The Law on the Subject.

The principle of the "common law" that the title to decedent's personal estate passes to his personal representatives makes administration necessary, if there are creditors of the estate, so as to enable the creditors to bring suit and subject the property of the estate to the payment of the debts. The real estate passes directly to the heirs.

Am. & Eng. Enc. of Law, Vol. 11, 742.

Numerous cases are cited sustaining this proposition of law. We have examined them sufficiently to state that the weight of authority in the U. S. is to the effect that *if there are no debts, it is not necessary to have an administration.* The probate laws are directory, so far as establishing and decreeing heirship is concerned and while the authorities hold it is always better to have an administration, so as to have heirship adjudicated and placed of record, yet, if by neglect or otherwise there is no administration, to say that the heirs of the deceased cannot and do not inherit all the property even in California, is simply absurd.

Appellant asserts in his brief that if any instrument affecting the title of real estate in Mexico is not recorded such vitiates said instrument. His own witness, Boix, the Mexican lawyer, contradicts this assertion [Tr. pp. 695-7], also it is contradicted by the witness Seijas [Tr. pp. 928-9].

We insist that the burden is still upon the defendant to point out the defect of title in his pleading. Having

failed to do so, he cannot prove the facts showing the defect.

The defendant in this case, we submit, has failed in both instances. They have failed to allege the defect in regard to the McKamy heirs in his answer and have wholly failed to prove any defect of title.

We submit that the evidence shows that the complainant has had continuous, peaceful possession of the property under color of title for more than 11 years prior to the institution of this suit and thereby the two alleged defects in complainant's title, if any ever existed, have been cured and the title perfected by the statute of limitation.

As to what is meant by onerous title generally, and in Mexico, see Noe v. Card, 14 Cal. 576.

We have discussed the alleged defect of title only because opposing counsel did so in their brief.

We still insist that appellant must stand by the terms of his contract, as to the character of the title to be conveyed, and that he has waived all defects of title, if any, to the property in question.

IV.

Appellant's Fourth Assignment of Error.--- The court erred in overruling the demurrer and in granting relief in equity to the complainant because of the unconscionable nature of the contract in suit and of the provisions which permitted its nullification by the complainant.

Appellant in his brief has repeatedly stated he acquiesced in the findings of fact and decision of the lower court in regard to the issues of fact in this case and also acquiesces in the construction placed on the contract in question by the court, and yet he complains bitterly.

Counsel for appellant set forth in their brief pp. 69-71 in head lines as follows:

"Defendant's Obligations."
"Defendant's Apparent Rights."
"Defendant's Real Rights."
"Complainant's Rights."
"Complainant's Obligations."

Under each of these opposing counsel draw many far fetched inferences; indeed there seems to be no limit to the fertile imagination of counsel for appellant, as indulged in under each of said captions.

The answer and brief of appellant in this case are teeming with thrilling incidents, but we submit in all candor, such are irrelevant to the issues involved.

Please read the contract. Its meaning is *clear throughout* (except perhaps in paragraph 8, which, in the light of the evidence, the lower court held was *ambiguous*).

The Dual Nature of the Contract.

The contract in suit (given in full in the Transcript at p. 23) contains two distinct agreements.

First, in said contract Clark and his associates are given an option on the property for the period of one year at $600,000 upon certain conditions to be terminated in less time, in the event the complainant should find another purchaser for the property for $600,000 or more, during the year, and if Clark did not chose to take the property at such price. Counsel for defendant devotes many pages of their brief in argument to show that because of this condition in said option, that the *whole contract* itself is inequitable, unjust, unfair, unreasonable and *that it is not mutually binding*. It is contended that the option is unfair and if the contract of sale is enforced it would work a great hardship on defendant.

The option might have been limited to 10 days or 30 days or any other time that might have been agreed upon by the parties, and defendant would have no right to complain; he paid no money for the same.

Such an option might have contained any condition the parties saw fit to place therein and it would have been binding upon the complainant, as an option is a unilateral contract. Such unilateral contracts are given in the interest of the party who takes the option, i. e., the optionee is not bound to take the property, but the optionor is bound to sell if the former exercises his option; and the stipulations and conditions placed in

such contracts are as multitudinous as the leaves on the trees.

Secondly, there is another agreement contained in said contract and that is—Clark and his associates made an unconditional offer of $400,000 for the property, and this offer, by the terms thereof, is made to stand good for the life of the contract, which is twelve months. The only condition attached to this offer is, that complainant company should notify Clark and his associates in writing, of its acceptance of such offer at any time during the twelve months.

The offer was not mutually binding until it was accepted by the complainant company and written notice thereof given to Clark and his associates. In other words, Clark and his associates did not obligate themselves to pay the $400,000 unless the offer was accepted in the time limit. *When said offer was accepted on April 28th, 1903, then the option given in the same contract to Clark and his associates expired and became null, by the terms of the contract.*

So we submit *that the conditions of the option have no bearing on or relevancy to the said offer so made by Clark and his associates* to purchase the property. The two agreements in the contract are as distinct as two separate contracts made at different times. In other words, it makes no difference how *"harsh, unjust, unreasonable, doubtful, vague, uncertain, cunning and ambiguous" the option* may have been the same has no bearing on, and certainly could not alter or affect the *unconditional offer* to purchase the property contained in the contract.

The option was not essential to or dependent on the offer. When the offer to purchase the property was accepted by the complainant company, *it then became vitalized and binding on all the parties and was a good and valid contract.* There is no remedy expressly given to Clark and his associates in regard to enforcing this contract of purchase for $400,000 or for the breach thereof.

The last half of paragraph 8 of the contract, it will be seen, is not a part of, and in fact, has no connection with *the offer of $400,000* to purchase said property, but the same relates only and exclusively *to the option* given to Clark and his associates.

Said paragraph of the contract is as follows:

"And the second parties shall under the provisions of "this contract become entitled to exercise their option "to buy the said property at $600,000 and shall elect to "exercise said option and shall thereupon offer to pur- "chase said property at said price and the first party "shall fail or refuse to comply with this contract to sell "their said property at said price, then the first party "shall be liable to the second parties in liquidated dam- "ages to the amount of $100,000. This shall not deprive "the second parties of the right to *waive* damages and "have specific performance of this contract."

There is *no provision,* in case of a breach of *the contract to sell at $400,000* by the complainant, for the payment of liquidated damages by the complainant to Clark and his associates and said waiver clause does not refer thereto. Then, where is any ambiguity in said contract of sale for $400,000? Where is the provision for

"withholding the remedy of specific performance of said "contract from complainant?"

The stipulation for the payment of liquidated damages in the sum of $100,000 by the complainant *is only included in, and is a part of, the option contract* in favor of Clark and his associates *to purchase the property at $600,000.*

The option to purchase the mine at $600,000 never was exercised by Clark and his associates, and hence never became a binding contract on the part of Clark and his associates. It is simply a unilateral contract wanting in mutuality altogether, unless Clark had seen fit to exercise his option in the time specified; he could then have enforced the same against complainant company, in a suit for specific performance, because said contract was founded upon a valid consideration, or Clark could at his option have sued for the stipulated damages of $100,000 if the complainant had breached the same.

For this option contract provides by the last sentence in section 8, that the above and foregoing provision for stipulated damages in favor of Clark "shall not deprive "the second parties (Clark and his associates) of the "right to waive damages and have specific performance "of this contract." That is, Clark and his associates should have the right to specifically enforce the *option contract* at the price of $600,000 notwithstanding the provision for payment of $100,000 damages for breach of the option contract.

Said *waiver clause,* then we submit, cannot be considered as *a part of said offer contract which becomes*

mutually binding by the acceptance thereof. This latter is the contract sued on, and the mutuality of the same is not affected by said provision of paragraph 8 above quoted.

We submit there is absolutely nothing in appellant's *nullification argument and theories.* The parties to the option contract had the right to agree to terminate the same at any time.

Appellant also contends that if this court compels him to pay his *honest debt, the liquidated damages* for the breach of his contract, *that this will work an exceedingly great hardship upon him and for that reason this contract should not be enforced.*

Hardship.

Whoever executes a contract to do some lawful act, in the absence of fraud or mistake, is required to perform his contract or pay the damages. Contracts relating to the sale of real estate are always enforced, if found to be mutually binding, regardless of whether they work a hardship on one party or the other.

Mr. Pomeroy in the last edition of his eminent work 6 Pomeroy Equity Jurisprudence, Sec. 78, lays down the law clearly and forcibly on this point.

"Where no other element enters than a hard bargain "or mere inadequacy in consideration, it is the rule in "equity to enforce the contract. The mere fact that de- "fendant entered into a losing bargain or one where "plaintiff will reap great gains is clearly never a ground "to refuse specific performance."

Other authorities supporting said proposition:

Franklin Co. v. Harrison, 145 U. S. 459;
Whittier v. Furquay, 127 N. C. 68;
Young v. Wright, 65 Am. Dec. 303 (Wis.);
Lee v. Kirby, 104 Mass. 420;
Clark v. Hutzler, 96 Va. 73.

In conclusion we respectfully submit that the last clause in paragraph 8 of the option contract known as the *waiver* clause does not withhold from complainant the right of specific performance of said contract of sale for $400,000 and that said contract is free from *ambiguity*.

We will now undertake to reply to the last assignment of error made by appellant, to-wit:

V.

The court erred in making any decree other than one of dismissal in the absence of Sizer and the administrator of Whitmore's estate.

Appellant contends, "No court can adjudicate directly "upon a person's right without the party being either "actually or constructively before the court."

In many cases, this proposition is true and correct but there never was a rule of law or equity laid down but what there are some exceptions to the same.

It is held by all courts of equity as well as by the Federal courts that in regard to litigation over the rights of parties in land, that a court can not and will not undertake to partition real estate or to divest the title out of any person unless such person is a party to the

suit. Therefore in all such cases as partition suits and suits to quiet title or to divest title out of any person, regardless of the nature of such title or interest, a court of equity will not and cannot do so unless such interested party is made a party to the suit. So it is well settled that a court cannot render a personal judgment against a party to recover money unless such party is before the court. Neither will the court undertake to compel a person to rescind, cancel or execute an instrument of any description unless such person is properly before the court. All these are elementary principles of law well adjudicated by the state as well as by the Federal courts.

In support of the appellant's 5th contention above referred to and argument thereunder, counsel for appellant in their brief refer to and quote from seven cases.

We will now review each of said cases and undertake to show that not one of them militates against the principles of equity contended for by appellee in this case.

(1) Mallow v. Hinde, 25 U. S. 12th Wheat. 193.

This is a leading case on the question as to who are *necessary* parties and who are *indispensable* parties to an action in equity pending in the Federal Courts.

In this case plaintiff Mallow and his associates sued the defendant Hinde for the recovery of and to adjudicate the title to a survey of land in the state of Ohio.

The defendant alleged and the evidence showed at the trial of the case that four of the parties, to-wit, Taylor, William and Joseph Beard and Mrs. McGowan, held the legal and superior title to the land and that these persons were non-residents of said state and could not be

made parties to the suit. They were the parties under whom Mallow and his associates claim title to the land; and that in fact, the *complainants only had an executory contract from the three last mentioned parties, William and Joseph Beard and Mrs. McGowan, to purchase the property in question.* Hence the court held that said four persons, Taylor, William and Joseph Beard and Mrs. McGowan were not only *necessary* but *indispensable parties* to the suit, as their rights were so interwoven and inseparably connected with the complainants' rights. It was also held that a court of equity could not and would not undertake to adjudicate the same, and that the complainants had no standing in court and had no cause of action whatever against the defendants as shown by the pleadings and evidence.

The Supreme Court held that the complainants might have enjoined the defendant from executing the judgment which he had obtained at law against the complainants for the recovery of the property in question until the complainants had sued upon their executory contracts made with William, Joseph Beard and Mrs. McGowan and had the same enforced as against the four absent persons and that it was the complainants' duty to go into the states where said four parties resided and there adjudicate in the proper tribunal his rights as against said four absent persons. If he had thus enforced his executory contracts and obtained the legal title to the land from the four absent persons, then he could have maintained his equitable action against the defendant Hinde in the pending suit in the U. S. Circuit Court.

We quote the very language of the Supreme Court on these important issues, as follows:

"In this case, the complainants have no rights sep-"arable from, and independent of, the rights of persons "not made parties (Taylor, William and Joseph Beard "and Mrs. McGowan). The rights of those not before "the court lie at the very foundation of the claim of right "by the plaintiffs, and a final decision cannot be made be-"tween the parties litigant *without directly affecting and "prejudicing* the rights of others not made parties. No "court can adjudicate directly upon a person's right, "without the party being actually or constructively be-"fore the court.

"We have no doubt the Circuit Court had jurisdiction "between the complainants and the defendant, Hinde, "so far as to entertain the bill, and grant an injunction "against the judgments at law, until the matter could be "heard in equity.

"And if it had been shown to the Circuit Court, that "from the incapacity of that court to bring all the neces-"sary parties before it, that court could not decide finally "the rights in contest, the court, in the exercise of a "sound discretion, might have retained the case, and "granted the injunction, on the application of the com-"plainants, until they had reasonable time to litigate the "matters in controversy between them, and Taylor and "the Beards in the courts of the state or such other "courts as had jurisdiction over them; and if then it was "made to appear by the judgment of a competent tri-"bunal, that the complainants were equitably interested "with the rights of Taylor, the trustee, and the *cestuis*

"*que* trust in the survey #537, the Circuit Court could "have proceeded to decree upon the merits of the con- "flicting surveys.

"Such a proceeding would seem to be justified to pre- "vent a failure of justice; and the cause would have re- "mained under the control of the Circuit Court, so as to "have enabled it to prevent unreasonable delay, by the "negligence or design of the parties, in litigating their "rights before some competent tribunal.

"The cause having been brought to a hearing before "the Circuit Court in its present imperfect state of prep- "aration, that court could not do otherwise than dismiss "the bill," *but not because it did not have jurisdiction of the case.*

No doctrine laid down by a court in a case can be clearly understood until the decision is construed in connection with the particular facts of said case. The doctrine laid down by the Supreme Court in the Mallow case is clearly correct in every particular. The court simply held in that case that no title could be divested out of the four non-resident persons, to-wit, Taylor, William and Joseph Beard and Mrs. McGowan, unless they were made parties, because the complainants in the case had only an executory contract to purchase the land in question from said four persons and hence a court of equity could not enforce said contract or adjudicate such rights without doing injury to and prejudicing the rights of the four absent persons.

(2) Shields v. Barrow, 17 Howard 130.

We submit this case is not in point because it is an action brought to rescind a contract for the sale of land in which the complainant Barrow failed to make and could not make the purchaser of the land, to-wit, Thomas R. Shields and four out of six of the endorsers of his promissory note executed for the purchase money of the land, parties defendant, because each and all of said five persons resided in the same district and in the same state, to-wit, Louisiana, in which the plaintiff resided. Only two persons were or could be made defendants in this case by reason of adverse citizenship and they were Mrs. Shields, the wife of the purchaser, and one Bisland, both being endorsers on the purchase money notes executed by Thomas Shields, the purchaser.

The court very properly held in this case that the contract to purchase and the several notes given for the purchase money could not be rescinded and cancelled until Thomas R. Shields, the purchaser and maker, and the four endorsers of his notes were properly made defendants in the U. S. Circuit Court. In other words, the court could not divest the equitable interest of Thomas R. Shields in the land out of him, nor cancel the contracts executed by him and the other endorsers unless such persons were properly made parties in this suit.

(3) Barney v. Baltimore, 6th Wallace 280.

We quote from the opinion of the court as follows:

"This suit was brought by Mary Barney, a citizen of "Delaware, in the Circuit Court of the U. S. for the dis- "trict of Maryland, against the City of Baltimore and "several individuals, citizens of the state of Maryland,

"and against William G. Ridgeley, Matilda L. and Ann "C. Ridgeley, citizens of the District of Columbia. It "is a bill in chancery, the object of which is *to have a "partition of certain real estate* in the City of Baltimore "and an accounting of lands and profits with other in- "cidental relief."

At the trial of the court it was properly held that the four citizens of the District of Columbia could not be made parties to the suit, because they were residents of a territory and not a state. And thereupon, the suit was immediately dismissed as to said citizens of the District of Columbia and their interests were nominally and fraudulently conveyed to the plaintiff in the case and the court held:

"This conveyance did not transfer the real interest of "the grantors but was made without consideration with "a distinct understanding that the grantors retained all "their real interest and that the deed was to have no "other effect than to give jurisdiction to the court and "the court has no jurisdiction of the case."

In other words, this was a plain suit *to partition a tract of land in which four of the persons who owned an interest in the land were not and could not be made parties to the suit.* The court held in substance that the interest vested in said four absent parties could not be in any way *divested* out of them or altered unless they were parties to the suit.

So we submit that this case throws no light on the case at bar.

(4) Ribon v. C. R. I. & P. Ry. Co. & M. & M. R. R. Co., 16 Wallace 446.

Prior to the institution of this suit there had been a suit of foreclosure instituted upon five mortgages executed by the railroads in question and the five trustees mentioned in the mortgages, and said mortgages had been foreclosed in said suit.

The present suit was instituted by some of the disgruntled bondholders to set aside the foreclosure sale under the judgment on account of alleged fraud. But quoting the language of the Supreme Court in this case, "The trustees in the five mortgages which were fore-"closed should have been made parties. Their presence "as such were indispensable, and if the sale should be "annulled they might be in the situation of the plaintiff "who collects a judgment which is afterwards reversed. "He may be called upon to refund and compelled to do "so. A question would also arise whether the considera-"tion of the agreement under which the five and one-"half millions of bonds were paid had not failed and "whether all the bondholders and stockholders who par-"ticipated in the distribution of the proceeds of the sale "should not be required to refund." And the Supreme Court held that the sale could not be set aside unless said five trustees who were trustees for the bondholders were made parties to the last suit to set aside such foreclosure sale.

We most respectfully submit that this case is not in point.

(5) Marshall v. Beverley, 5 Wheat. 313.

We quote from the syllabus in this case which states the facts as well as the conclusions of law of the court as follows:

"In equity, a final decree cannot be pronounced until "all parties in interest are brought before the court.

"Where a bill was filed for a perpetual injunction, on "judgments obtained on certain bills of exchange drawn "by the plaintiff, and negotiated to the defendant, and "which had subsequently passed from the latter into the "hands of third persons, by whom the judgments were "obtained; held, that the injunction could not be de-"creed until their answers had come in, although the "bill stated, and the defendant admitted, that he had "paid the judgments, and was then the only person in-"terested in them, because such statement and admis-"sion might be made by collusion."

This case has no application whatever to the facts in the case at bar.

(6) Shingleur *et al.* v. Jenkins, 111 Fed. Rep. 452.

This was a suit for an accounting brought by the plaintiff against William B. Swift and Felix J. Jenkins. It was alleged that much money had been misappropriated by Swift in the purchase and sale and shipment of cotton in Georgia and that Swift was the agent of Jenkins. After the institution of the suit it was discovered that Swift had left the district and the state of Georgia and could not be served with process of the court. Thereupon the case was dismissed as against Swift, and complainant endeavored to prosecute the suit against Jenkins.

This case was not before an Appellate Court or even tried by a U. S. circuit judge, but the opinion of the U. S. Circuit Court was rendered by *Newman, district judge,* who held said court and rendered the decision in the case as follows:

"Swift was a necessary and indispensable party and "the court could not entertain the suit and undertake to "determine the rights of the parties" in the absence of Swift, who was the person who is alleged to have committed the fraud and made the misappropriation of the money in question. So we cannot see that there is much in this case to benefit the appellant.

We now come to the last and perhaps the most important of the cases cited by appellant, to-wit:

(7) California v. So. Pac. Co., 157 U. S. 229.

This is a suit between the State of California and the So. Pac. Co. to determine the title to a certain tract of tide land on the Bay of San Francisco, located in or adjacent to the city of Oakland. The city of Oakland endeavored to intervene in the case, but for some reason did not do so. However, the Supreme Court allowed the attorneys for the city of Oakland to file a brief and to argue the rights of the city of Oakland to the land in question in the pending suit and the court properly held that the pleadings and the evidence both showed that the city of Oakland had an interest in the land in question and that the same could not be partitioned or the title thereto adjudicated and quieted as between the State of California and the So. Pac. Co. unless the city of Oakland was a party to the suit. In other words, the title or interest to the land in question held by the city of Oak-

land could not be *divested out* of said city of Oakland or *partitioned* unless the said city of Oakland was made a party to said suit.

This is a very important case and reviews most all of the other cases cited by the defendant and establishes no new principle of law whatever.

We quote from the opinion of the Supreme Court in said case of California v. Southern Pacif. Co. as follows:

"*It was held in Mallow v. Hinde, 25 U. S. 12 Wheat.* "*193 (6:599) that where an equity cause may be finally* "*decided between the parties litigant without bringing* "*others before the court who would, generally speaking,* "*be necessary parties, such parties may be dispensed* "*with in the Circuit Court if its process cannot reach* "*them or if they are citizens of another state,* but if the "rights of those not before the court are inseparably "connected with the claim of the parties litigant so that "a final decision cannot be made between them without "affecting the rights of the absent parties, the peculiar "constitution of the Circuit Court forms no ground for "dispensing with such parties. And the court remarked: "'*We do not put this case upon the ground of jurisdic-*" '*tion,* but upon a much broader ground, which must " 'equally apply to all courts of equity whatever may be " 'their structure as to jurisdiction. We put it upon the " 'ground that no court can *adjudicate directly upon a* " '*person's right, without the party being actually or* " '*constructively before the court.*'

"In Shields v. Barrow, 58 U. S. 17 How. 130 "(15:158), the subject is fully considered by Mr. Jus-"tice Curtis speaking for the court. The case of Rus-

"sell v. Clarke, 11 U. S. 7 Cranch 98 (3:281), is there "referred to as pointing out three classes of parties to a "bill in equity:

"1. Formal parties. *2. Persons having an interest "in the controversy, and who ought to be made parties, "in order that the court may act on that rule which re- "quires it to decide on and finally determine the entire "controversy, and do complete justice, by adjusting all "the rights involved in it. These persons are commonly "termed necessary parties; but if their interests are sep- "arable from those of the parties before the court, so "that the court can proceed to a decree, and do complete "and final justice, without affecting other persons not "before the court, the latter are not indispensable par- "ties.* 3. Persons who not only have an interest in the "controversy but an interest of such a nature that a "final decree cannot be made without either affecting "that interest or leaving the controversy in such a con- "dition that its final termination may be wholly incon- "sistent with equity and good conscience."

"On behalf of the city of Oakland, which was per- "mitted to be heard at the bar by counsel as *amici curiae,* "it was insisted that the original grant of the water "front to the town of Oakland had never been revoked; "that the city was simply the town's successor in that "regard; and that its rights thereunder, of whatever "nature, had in no manner been affected by any exertion "of the legislative power of the state. Admitting that a "municipal corporation as such, has no proprietary in- "terest or riparian rights in tide lands situated within "its corporate limits, *the city claimed that the title had*

"passed to it from the state; that, regarded as holding "in trust a governmental agency, nevertheless it had an "interest in the grant of individual advantage, and that, "in any view, as an existing corporate entity clothed "with powers to be locally exercised, though for the gen- "eral public good, *it could not be divested thereof in the "absence of legislation to that end by proceedings in "which it was not allowed to participate as a litigant.*

"The prayer of the bill was, among other things, for "a *decree adjudging that the state could not make such "a grant to the town; that the town of Oakland had no "authority to grant or convey all its water front or any "part thereof;* and that any control conferred on the "town by the act of 1852 was annulled by the act of 1854.

"If this court were of opinion that the city of Oak- "land occupied the position of the successor merely of "the town of Oakland; that the grant of the water front "to the town was as comprehensive as is claimed by de- "fendant, and that it had not been annulled by any act "of the legislature but also held that the state had no "power to make such grant, *then the city of Oakland "would be deprived of the rights it* CLAIMS *under the "grant,* not by the exercise of the legislative power of "the state as between it and its municipality, *but by a "judicial decree in a suit to which the city was not a "party.*

"And if the proceedings which purported to vest title "in the *Oakland Water Front Company were held* in- "effectual, for the same reason, then *the latter company "would find the foundation of its title swept away in a "suit to which it also is not a party.*

"We are constrained to conclude that the city of Oak-"land and the Oakland Water Front Company are so "situated in respect of this litigation that we ought not "to proceed in their absence."

It will be noticed *in the Marlow case that the Supreme Court held that the trial court properly had jurisdiction of the case* but should refrain from passing upon and adjudicating the rights in the land of the four non-resident persons who were not made parties to the suit and that the court could not divest the title to the land in question out of said four absent parties.

We quote from the opinion of the Supreme Court in said Marlow case as follows:

"We do not put this case upon the ground of jurisdic-"tion, but upon a much broader ground which must "equally apply to all courts of equity whatever may be "their structure as to jurisdiction. We put it upon the "ground that no court can adjudicate directly upon a "person's right without the party being actually or con-"structively before the court."

So in the case of California v. So. Pac. Co., the court did not hold as contended by appellant, *that the court did not have jurisdiction of the case. The court on the contrary held it had jurisdiction of the case, but simply refused* "to proceed to a decree as between the state and "So. Pac. Co." because the court was of the opinion it could not "do complete and final justice without affect-"ing other persons not before the court, or leaving the "controversy in such condition that its final termination

"might be wholly inconsistent with equity and good con-"science."

So we respectfully submit that in not one of the seven cases cited did the Supreme Court hold that *the trial court had no jurisdiction* of the respective cases, but for the reason given in each case, the court held that the trial court could not adjudicate or divest or destroy the rights of absent persons who were not made parties to the suit without doing injury or prejudicing the rights of said absent parties in and to the subject matter of the litigation.

NON-JOINDER OF PARTIES.

A.

Sizer and Whitmore Have No Interest in the Contract or Mining Property in Question.

In the first place, neither Sizer nor Whitmore had any interest in the contract or property in question on April 28th, 1903, when the complainant gave written notice of its acceptance of the $400,000 offer contained in the contract, hence neither Sizer nor the administrator of the estate of Whitmore were necessary parties to the action for the specific performance of the contract and therefore the court had jurisdiction of said equitable action.

Defendant Clark admits in paragraph XXXI of his second amended answer that contracts were executed between himself and Sizer and Whitmore in which *"It "being further understood and agreed upon that this de-"fendant would in the first instance pay all of the ex-"penses of the examination exploitation and operation*

"of said mines and the entire purchase price thereof (to "complainant company)."

And again, in paragraph XLVI thereof, defendant admits that "Under the terms of the agreement hereto- "fore referred to, between this defendant and said Whit- "more and himself, *he, the said Whitmore, might evade "the payment of any money under said contract in suit "to said parties operating under the name of the Rosario "Mining & Milling Company."*

Clark admits that he executed a written contract with Sizer, which is attached as complainant's exhibit No. 1 to Clark's deposition, which provides in substance: That in the event Clark purchased said mining property, in consideration of the services to be rendered by F. L. Sizer in working said mine, he was to get a 1/8 interest therein after all of the purchase money and expenses paid by Clark shall have been fully repaid to said Clark, either from the profits obtained by working said mine, or the sale of the same by Clark. *And it is expressly stipulated in said contract that Clark should pay all of the purchase money therefor to complainant* and that Sizer should not pay or be liable for any of the purchase money. [Tr., pp. 609-11.] Clark states [Tr., pp. 610-11 of his deposition] that a similar contract in every particular was made by him with Whitmore.

Sizer in his depositions [Tr. pp. 371-3] says this was in substance the contract made between Clark and himself.

Witness Burney states [Tr., p. 309] "That Whit- "more's interest (in the contract) had ceased entirely. "He never had anything but a working interest."

And again, [Tr., pp. 311-12] said witness states: "I "do not remember that Clark definitely stated (April "28th, 1903) that E. L. Whitmore no longer had any "interest whatever in the contract or in the mine. This "conversation was in the presence of Mr. Sizer and my "recollection is that Sizer, at that time, stated that it "was wholly with Mr. Clark as to whether he would be "allowed the interest in the property which he had orig- "inally expected to have." [Sizer's deposition, Tr. pp. 371-3.]

And again [Tr., pp. 311-12] Burney states: "Mr. "Clark stated that it was not necessary to have any such "contract (to indemnify complainant against any inter- "est of Whitmore and Sizer) for the reason that Mr. "Whitmore's interest in the pending contract had long "since ceased."

The contracts referred to were entered into by and between Clark, Sizer and Whitmore on the 25th of January, 1901, during the existence of the first option contract bearing date of 12th day of December, 1900, which is referred to and made a part of said contracts. These contracts were executed for a valuable consideration and became part of the whole transaction on the part of Clark, Sizer and Whitmore to purchase the mining property from the complainant, and necessarily formed a part and parcel of the contract sued upon, dated May 1st, 1902, as between Clark, Sizer and Whitmore. They constituted an assignment or relinquishment of Sizer's and Whitmore's interest in the contract sued on, to Clark. The contract of August 12, 1901, was simply

an extension of the contract of December 12, 1900, and the contract sued on was and is as it stipulates executed in lieu of said contract of December 12, 1900.

Then, in view of these contracts, *can it be said, if Sizer and Falconer, the administrator, are not parties to this suit and Sizer and the heirs of Whitmore have no interest in the contract in suit, and the title to the property in question is conveyed to Charles W. Clark in accordance with the terms of the written contracts between Clark, Sizer and Whitmore, that they could complain or raise any objection? Has Clark any right to complain? Undoubtedly not.*

The contracts between Clark, Sizer and Whitmore were acted upon by them during the whole of the examination and exploitation of the mine. The said contracts were binding upon said parties and hence, by the terms of said contracts, Sizer and Whitmore could under no circumstances whatever acquire any interest in the mining property until Clark could make enough out of the mine by working the same or from the sale of the mine to repay him the whole of the purchase money, to-wit, $400,000 and all the expenses of examination and operation of the mine. Then and then only Clark was to let Sizer and Whitmore have an interest in the property. Although Sizer and Whitmore had apparently a nominal interest in the contract in suit, in reality they had no interest whatever.

William Falconer, the administrator of the estate of Whitmore, states in his deposition [Tr., pp. 332-50] that after investigating the Rosario matter and contract in question and being advised about the matter by his at-

torney he *disclaimed* any interest whatever in the contract in suit or the property in question and hence he refused to approve the claim of four hundred thousand ($400,000.00) dollars for the purchase money presented to him by the complainant. The evidence shows that Sizer and Falconer and said heirs of Whitmore have been requested to enter their appearance in this case in order to protect their right if they had any. All of said parties have declined to appear in this case. The complainant has done everything in its power to make said persons parties to this suit, but it cannot be done. Sizer in his deposition says that the understanding between Clark and himself was that by reason of the contract, bearing date of 25th of January, 1901, he had no interest in the contract or property.

The evidence shows that neither Whitmore nor Sizer had any interest whatever in the contract sued upon, or in or to the property in question at the date the complainant accepted the offer made by defendant Clark and his associates, on the 28th day of April, 1903, or at the date of filing this action.

Can anyone, in view of all this array of testimony and the written contracts between Clark and Sizer and Whitmore, doubt that the said contracts were intended to be a complete relinquishment or assignment by Sizer and Whitmore of their contingent interest and rights in and to the contract sued upon, to Clark?

Suppose Clark had made a tender of the purchase price for the mine, to-wit, $400,000 and interest, to complainant and had instituted suit upon the contract in this case to compel the complainant company to convey

to him the property in question in accordance with the terms of the contract, could he not have maintained the suit? He has as such assignee unquestionably the right to sue the complainant company in his own name for the specific performance of the contract in question and to enforce said contract against the complainant company according to authorities herein below cited; then having such right to specifically enforce the contract himself, unquestionably the complainant company by reason of the mutuality of the contract, has the right to sue Clark alone for the specific performance of the contract and to compel him to pay the purchase money.

The contract between Clark, Sizer and Whitmore having been executed during the existence of the first option contract with the distinct understanding that Clark should purchase the property in question and having been acted upon by them in the exploitation and examination of the mines, such contracts would be treated as an assignment of the interest of Sizer and Whitmore in the contract and in the mine to Clark. And we respectfully submit, under all the authorities, that Mr. Clark could set up such contract and the assignment thereof on the part of Sizer and Whitmore and maintain an action in his own name for specific performance of the contract against the Rosario Mining & Milling Company, regardless of whether Sizer or the heirs or administrator of Whitmore are made parties to this suit or not.

The complainant and its attorneys did not know of these written contracts between Clark on the one part and Sizer and Whitmore on the other, until the deposi-

tions of Sizer and the defendant Clark were taken in this case, though they did know it was the understanding between Clark and Sizer and Whitmore that Clark was to pay for the property.

"The original vendee of an estate is not a necessary party to a bill against his assignee for specific performance of an agreement to purchase."

Betton v. Williams, 4 Fla. 11.

"A third person for whose benefit a contract to convey land was made may maintain a bill for the enforcement of the contract, although he was not privy to the consideration."

Claypool v. Board of School Com., 132 Ind. 261;
Jordan v. White, 20 Minn. 91;
Van Dyne v. Vreelabd, 11 N. J. Eq. 470;
Crowell v. St. Barnabos, etc., 27 N. Y. Eq. 654;
Lawrence v. Fox, 20 N. Y. 268.

"An assignee of a vendee may maintain a suit for specific performance in his own name against the vendor. The original vendee is not a necessary party."

Chaney v. Bilby, 74 F. R. 52;
Willard v. Taylor, 8 Wall. 557;
Peck v. Ashurst, 108 Ala. 429;
Owen v. Frick, 24 Cal. 171;
Hunt v. Hoyt, 10 Colo. 278;
Simms v. Lide, 94 Ga. 553;
Fuller v. Bradley, 160 Ill. 51;
Harshman v. Mitchell, 177 Ind. 312;
Weis v. Meyer, 1 S. W. (Ark.) 679.

In the last case cited, the Supreme Court of Arkansas says:

"Dryfus and Meyer upon their purchase under the de-"cree, held the naked legal title to the lands that had "been previously conveyed to Hilliard in trust for him, "and it was their legal duty to execute a deed to him in "accordance with their contract. After the conveyance "by Dryfus to Meyer the latter held the legal title sub-"ject to the same duty. The obligation of Dryfus and "Meyer was assured for their own as well as for the ex-"press benefit of Hilliard and others in similar circum-"stances and was induced by their common grantors, "who were resting under a legal obligation to protect "from harm the interest in the lands they had sold.

"The right of a party to maintain an action on an "agreement made with another for his benefit is a doc-"trine to which this court had given its assent and it en-"titled Hilliard to maintain suit in his own right to en-"force the contract set forth. (Hetcht v. Coughran, 46 "Ark. 132.) The appellant by Hilliard's conveyance "to him of his entire interest, succeeded to his rights, "and was entitled to file the complaint (for specific per-"formance) in his own name."

Under the written contracts, Clark has a complete guarantee that Sizer nor the heirs or administrator of Whitmore will not and cannot interfere with his rights to the property in question, if the same should be conveyed to him. He alone is entitled to the fruits of his contract and he alone is responsible for the carrying out of said contract. Hence, we submit, in reply to the contentions of the defendant, that a decree of specific per-

formance could be made without affecting the rights and obligations of Sizer and the estate of Whitmore. And also under the facts and equity of this case, there is no question whatever but that complete justice can be done in this case without the presence of Sizer and the personal representative of Whitmore.

APPELLEE'S SECOND PROPOSITION IS AS FOLLOWS:

Even if Sizer and the heirs of Whitmore had an interest in the contract (which is denied) they might in the action for specific performance be necessary parties, but certainly are not indispensable parties, and this court could even in that event take jurisdiction of the case and render a decree against defendant Clark and enforce the contract without injuring or prejudicing the rights of either Sizer or the heirs of Whitmore.

1. We shall undertake to show that Sizer and the administrator and heirs of Whitmore are not *indispensable* parties and the court can render a decree against Charles W. Clark for the purchase price of the land and have the land conveyed either to Clark or to Clark, Sizer and the heirs of Whitmore, in accordance with the terms of the contract, Clark being the only one of the parties to the contract that resides within the jurisdiction of this court.

In the case of Mandeville *et al.* v. Riggs, 2 Pet. 482 (7 L. 494), the Supreme Court states:

"It is a matter of justice, as well as convenience, *that "all the parties who are ultimately liable to contribution "should, when practicable, be brought before the court,* "so that the equities between them may be adjusted as "well as the right of the plaintiff. There are excep-

"tions, it is true, to the rule, but they are founded upon "special considerations; such as where a decree of con- "tribution would be useless, or *where the proceeding "would defeat the jurisdiction of the court, and the par- "ties are not indispensable to a decree, or where* the con- "venient administration of justice forbids it in the par- "ticular case."

2. The *principal object* of the suit for specific performance is *to make* one of the joint obligors, to-wit. *Charles W. Clark, pay the obligation sued upon,* he being one of the three joint obligors. Complainant alleges, and it is admitted, that it has complied with the contract in question fully, and has duly executed a deed conveying the mines and land in question to Clark, Sizer and heirs of Whitmore, in accordance with the provisions of the contract, and has made a tender of said deed to said Clark, Sizer and the administrator of said Whitmore; hence the only thing to be done by the court is to order the deed to be placed in the hands of a commissioner appointed by the court for the benefit of the purchasers and to be delivered to said purchasers upon the payment of the decree for the purchase price. *Said parties* would be simply *tenants in common* of the land in question, when said land is conveyed to either Clark, or to Clark, Sizer and the heirs of Whitmore, as provided by the contract. *This court has nothing whatever to do with the partition of the land among said purchasers nor could this court attempt to adjust the rights of said parties in said land in this cause.* That is a matter strictly to be settled among themselves. *Defendant*

Clark cannot object to paying the joint obligation executed by him, Sizer and Whitmore, and obtaining the deed to the land in question, as specified in the contract. If Sizer or the heirs of Whitmore have much or little interest in the land, that is immaterial to the matters in controversy in this case. The land will have been conveyed in accordance with the contract and the defendant Clark, can, in a proceeding against Sizer and the estate of Whitmore (if not insolvent, as contended by defendant) collect any amount of money, if any, that may be due him by reason of having paid all the purchase money for the land in question.

The principal and sole controversy in the action for specific performance is to adjudicate the amount due the complainant for the purchase price of the land and to render a decree for the same and to order an execution in favor of the complainant for the collection of said amount.

3. Warvelle on Vendors, pp. 779 and 780, clearly states the law on this subject as follows:

"A suit in equity against the vendee to compel the "specific execution of a contract of sale, *while in effect "an action for the purchase money*, has nevertheless al- "ways been sustained as part of the appropriate and ac- "knowledged jurisdiction of such court, although the "vendor has in most cases another remedy *by an action "at law upon the agreement.*"

The effect of a suit for specific performance, as stated by Mr. Warvelle, is simply a suit in equity for the purchase money of the land because the complainant has already executed the deed called for by the contract and

tendered the same to Mr. Clark and the other parties to the contract and alleges its readiness and willingness to deliver the deed, or such other deed as may be ordered by the court, to the land to the defendant Clark, and his co-purchasers at any time.

4. Anderson *et al.* v. Wallace Lumber and Manufacturing Co., 70 Pac. (Wash.) 247, is a parallel case to the one at bar. The vendor sued the vendee for specific performance of the contract for the sale of the land. The Supreme Court of Washington, after discussing the law in general in regard to specific performance of a contract and quoting with approval the last paragraph quoted from Warvelle further states:

"The performance on the part of the defendant (the vendee) here required, is the payment of the purchase price, which may be enforced by collection of the money from any of the defendant's property or enforced by an order of sale as upon execution."

Can a court of chancery order a deed of conveyance to the property in question to be made to the defendants Clark and Sizer and the heirs of Whitmore, deceased, if said Sizer and said heirs are interested therein, when said Sizer and said heirs are not and cannot be made parties to this suit?

The leading case on this feature of the case is that of

1. Story v. Livingstone, 13 Pet. 359; 10 L. 208.

One Livingstone brought suit against Story for a certain amount of money due the former and *also to compel the latter to reconvey to him certain real estate for*

reasons set forth in the bill. After the suit was filed the plaintiff, Livingstone, died. His widow, who was executrix and sole legatee and devisee, was made a party plaintiff instead of the deceased.

After the testimony was taken in the case before a master it appeared that Livingstone also had a daughter, Cora Barton, who, under the laws of Louisiana, *was a forced heir of Edward Livingstone* and therefore inherited an interest in said real estate. Cora Barton was not made a party, however, to the suit and the defendant objected to the jurisdiction of the court, saying that she was not only a *necessary* but an *indispensable* party, to the suit, and that he could not be compelled to convey the land to Mrs. Livingstone in the absence of Cora Barton, an interested party. The court, in passing upon this issue, p. 375, states:

"We notice in conclusion, an objection to the report "urged in the defendant's petition for a rehearing, and "in the argument of the case. It is that *the decree of the "court below is inconclusive as to whom the property is "to be conveyed.* This is not an objection which the de-"fendant can be permitted to urge. *When he shall obey "the decree in reconveying and surrendering the prop-"erty, his responsibility will be at an end.* As to the de-"fendant, the decree of this court is conclusive against "all persons who may legally claim from him any in-"terest in the property as *devisee* or *heir* of *Edward Liv-"ingstone. As to those, the law of Louisiana fixes their "respective rights and upon those rights this court has "not, nor does it intend to adjudicate in this cause.* The "general rule certainly is that all persons materially in-

"terested in a suit ought to be parties to it, either as "plaintiffs or defendants, that a complete decree may be "made between those parties (Caldwell v. Taggert, 4 "Peters 190). But there are exceptions to this rule, and "one of these is, *where a decree in relation to the subject "matter of litigation can be made, without a person who "has an interest having that interest in any way con- "cluded by the decree.* (Bailey v. Inglee, 2 Paige 122.) "See also Joy and Wurts (Wash. C. C. R. 577), where "the rule is comprehensively expressed, in respect to "*active* and *passive parties,* and where a party is not "amenable to the process of the court, or where no bene- "ficial purpose is to be affected by making him a party, "such interest might be a right in the subject of con- "troversy which may be affected by a decree in the suit. *"Such is the case as to Cora Barton, in this cause. The "subject matter is to obtain from the defendant money "decreed to be due to Edward Livingstone, and the sur- "render and reconveyance of property forming a part of "the real estate of Edward Livingstone. After his death, "his widow, as executrix, was made a party to the bill; "and the decree in this suit cannot in any way determine "the rights of Cora Barton in her father's estate. * * * "But further the objection cannot prevail for it does not "show that the process of the court could reach Cora "Barton.* In Mallow v. Hinde (12 Wheaton 193), *it was "ruled that wherever the case may be completely de- "cided as between the litigant parties, an interest ex- "isting in some other person whom the process of the "court cannot reach, as if such person be a resident of "another state, will not prevent a decree upon the mer-

"*its*. And, in the same case, it was decided where an "equity cause may be finally decided as between the par- "ties litigant, without bringing others before the court "who would, generally speaking, be necessary parties, "such parties may be dispensed with in the Circuit "Court, if its process cannot reach them, as if they are "citizens of another state. But when the rights of those "not before the court are inseparably connected with the "claim of the parties to the suit, the peculiar constitution "of the Circuit Court is no ground for dispensing with "such parties. (12 Wheaton, 194.) In whatever point "of view, therefore, the objection is considered, whether "as to the interest of Cora Barton in the suit, the time "when the objection has been made or the manner in "which it was made, in not showing that the process of "the court could have reached her, is of no moment in "this case.

"*This court in regard to her (Cora Barton) only di- "rects her name to be inserted in the reconveyance, it "having been ascertained by the master that she is a "forced heir of Edward Livingstone, and that fact be- "ing admitted by the defendant, and the admission of its "correctness being the foundation of its objection.* The "decree of the court below, affirming the master's re- "port, and directing a reconveyance of the property, is "affirmed."

REMARKS.

This case we think is parallel, on the question of parties, to the case at bar. *The suit in the above and foregoing case was* a suit for specific performance of a contract to convey land, to-wit, a suit to cancel the deed in question which was executed by Livingstone to Story and for the purpose of compelling Story to execute a new deed conveying the land back to Livingstone by reason of an implied contract. So the suit had a double aspect, to-wit: For the cancellation of one deed which was made conveying the land to Story by Livingstone, *and also to compel the execution of a new deed conveying the title of the land by Story back to Livingstone.* Livingstone, who originally brought the suit, having died, his widow and sole devisee, made herself party plaintiff instead of her deceased husband. When the evidence in the case was being taken, it developed that there was a daughter of Livingstone, Cora Barton, who was a forced heir of Livingstone and she was not made a party to the suit. The defendant Story contended that she was an *indispensable party* to the suit, as under the laws of Louisiana, she was a forced heir of the deceased, and that said heir owned an interest in the land in controversy and that Cora Barton was claiming adversely to Mrs. Livingstone and to the will, and therefore, was not only a *necessary* but an *indispensable party.* The lower court granted the prayers of the bill, and ordered Story to execute a deed and convey the land to Mrs. Livingstone and Cora Barton, though the latter was not a party to the suit. And the Supreme Court held that the

lower court could not adjudicate the respective rights of Mrs. Livingstone and Cora Barton to the land in question, as *they were tenants in common and that was a matter to be settled among themselves* or *to be adjudicated in another suit.*

Just so in this suit we contend that the three purchasers mentioned in the contract, to-wit, Clark, Sizer and Whitmore, or rather his heirs, if Sizer and the heirs of Whitmore have any interest in the land, are tenants in common, and the respective rights of Clark, Sizer and the heirs of Whitmore in and to the land in question cannot be adjudicated in this court in this suit but must be settled among themselves or adjudicated in some other tribunal.

The Supreme Court held in case of Story v. Livingstone that Cora Barton was *a necessary party* but not an *indispensable party,* so under that decision we say that Sizer and the heirs of Whitmore, if interested in the contract, may be *necessary* parties but are *certainly not indispensable parties to the suit.*

If the court should order the tendered deed conveying the land to Clark, Sizer and the heirs of Whitmore to be delivered to Mr. Clark, the rights of Sizer and the heirs of Whitmore, if any, could not be under any circumstances jeopardized or injured, and Mr. Clark certainly could not object, for that is what he contended for.

After the acceptance of the offer of $400,000 by Charles W. Clark and his associates by complainant company and said contract became vitilized and binding upon all the parties, let us reverse the case and suppose that for some reason the complainant had refused to

comply with said contract and suppose that Mr. Clark had filed a suit for specific performance of his contract to purchase the land at $400,000 without joining Sizer or the administrator or heirs of Whitmore with him in such suit, and had tendered the purchase money to complainant; and suppose the *Rosario Mining and Milling Company had set up as a defense to the action brought by Clark that Sizer and the heirs of Whitmore were indispensable parties to the suit and therefore Mr. Clark was not entitled to enforce the specific performance of the contract in the absence of said parties.*

The question then arises, could Mr. Clark have enforced the contract? We respectfully submit that he could do so. This is an exact parallel case to that of Story v. Livingstone. Would a court of equity tolerate such a defense by said company? No. *It would have been the duty of the court, just as the court did in the case of Story v. Livingstone, to order that the name of Sizer and the heirs of Whitmore should be inserted in the deed of conveyance from the company to Charles W. Clark.*

The case of Story v. Livingstone was a suit for the specific performance of a contract implied by law and to require Story to convey the land in question to the surviving widow and sole devisee of Livingstone, deceased, which Story had fraudulently acquired with the means of Livingstone prior to the latter's death. *Mrs. Livingstone and Cora Barton,* the daughter and forced heir of Mr. Livingstone under the laws of Louisiana, *were tenants in common of the land in question. Cora Barton owned an interest in the land and was doing adversely*

to her mother, Mrs. Livingstone, and contrary to and adversely to the will which attempted to convey the whole title to the land in question to Mrs. Livingstone. *So Mrs. Livingstone as executrix of the estate did not and could not represent Cora Barton.* Story raised the objection that he could not be compelled to execute the deed conveying the land to Mrs. Livingstone, because Cora Barton had an admitted interest in said property and she was not made a party to the suit.

The Supreme Court says:

"This is not an objection which the defendant can be "permitted to urge. When he shall obey the decree in "reconveying and surrendering the property, his re- "sponsibility will be at an end.

"This court in regard to her (Cora Barton) only di- "rects her name to be inserted in the reconveyance, it "having been ascertained by the master that she is a "forced heir of Edward Livingstone, and that fact being "admitted by the defendant and the admission of its cor- "rectness being the foundation of its objection."

The supposed case of Clark suing the Rosario Mining and Milling Company for specific performance of the contract is identical with the case of Story v. Livingstone. Clark, Sizer and the heirs of Whitmore, if Sizer and said heirs have any interest in the contract and property in question, are tenants in common. Mrs. Livingstone and Cora Barton were tenants in common in the Story case. The court held in the Story case that it was just and equitable to insert the name of Cora Barton in the deed of conveyance from the defendant Story to Mrs. Livingstone. *So we think it is just, proper*

and equitable upon the same principle in the suit for the specific performance of the contract in question, that the name of Sizer and the heirs of Whitmore be inserted in the deed to the property in question to Mr. Clark.

Mr. Clark claims that the rights of Sizer and the heirs of Whitmore would necessarily be *injured* and *prejudiced* in a decree in favor of the complainant for specific performance, simply and for no other reason than that Sizer and the heirs of Whitmore or his administrator are not parties to this suit.

Now, Mr. Clark simply contends that Sizer and the heirs of Whitmore have an interest in the property in question and that their interest should be protected and not in any way injured or prejudiced. We most respectfully submit that according to the doctrine established in the case of Story v. Livingstone that if the trial court or this honorable court should see fit to render a decree for the specific performance of the contract, then, the case can be completely decided as between the litigant parties and the interests, if any, existing in Sizer and the heirs of Whitmore whom the process of the court cannot reach, because such persons are residents of another state could and would be fully guarded and protected as before stated. We submit, that Mr. Clark could not object to such a decree, because the interests of Sizer and the heirs of Whitmore would be completely protected in every way. Mr. Clark could not complain, neither could Sizer nor the heirs of Whitmore. Clark, Sizer and the heirs of Whitmore would be tenants in common. As to each of said parties in the prop-

erty, the contract "fixes their respective rights and upon "those rights this court has not, nor does it intend to "adjudicate in this case (Story v. Livingstone)."

As to the respective rights between Clark, Sizer and the heirs of Whitmore, they could be determined at any time in the future by the proper tribunal. *As this court in this case could not possibly have any jurisdiction to determine the rights in the property between the tenants in common even if they were all before the court. This would render the suit multifarious.*

We say then that the court did have jurisdiction to enforce the contract of specific performance and the trial court would have done so but for the fact the court found that the contract in the light of all the evidence introduced was ambiguous in one of its paragraphs and for this reason alone the court refused to enforce the contract, but followed the case of Cathcart v. Robinson and granted the complainant liquidated damages for the breach of the contract.

We cite one other case which is analogous and corroborates the Story case, to-wit:

Harding v. Handy, 11 Wheat. 437.

This was a suit in equity brought by the heirs at law of Comfort Wheaton, deceased, to set aside conveyances of land to Asa Handy, his son-in-law, obtained from the deceased by undue influence, fraud and imposition, and for a sale of the property and distribution of the same among said heirs. All the heirs of Comfort Wheaton, deceased, were not made parties; the plaintiffs were Harding, a son-in-law of the deceased, his wife, Nancy Harding, and Sterling Wheaton, a son of the deceased.

The bill showed on its face that four of the heirs of said Comfort Wheaton, to-wit, the children of Mary Handy, deceased, and Daniel Wheaton, deceased, a daughter and son, were not made parties to the suit.

The court, through Chief Justice Marshall, in passing upon the question, states:

"The objection to this decree is that the children of "Mary Handy, and the children of Daniel Wheaton, are "not parties to the suit.

"It has been supposed that it is not necessary, in "Rhode Island, to make all the heirs parties, because, by "the laws of that state, parceners can sue separately for "their respective portions of the estate of their ancestor. "This law would undoubtedly be regarded, in a suit "brought on the common law side of the Circuit Court. "Its influence on a suit in equity is not so certain. But, "however this may be, we are satisfied that a sale ought "not to have been ordered, *unless all the heirs had been "before the court as plaintiffs or defendants.* Although "the legal estate may be in Caleb Wheaton, under the "deed made by the administrator, yet he acknowledged "himself to be a trustee for the heirs, having purchased "for their benefit. They have, therefore, a vested equitable interest in the property, *of which they ought not "to be deprived without being heard.* They may choose "to come to a *partition*, and to redeem their shares by "paying their proportion of the money with which the "estate is charged. The bill does not state *that the heirs "who are not made parties are unwilling to become so*, "or cannot *be made defendants by the service of process.* "We think, then, there is error in proceeding to decree

"a sale, *without bringing all those heirs before the court "who can be brought before it;* and for this error the "decree must be reversed, and the cause sent back, with "liberty to the plaintiffs to amend their bill by making "proper parties. *If all the heirs cannot be brought be- "fore the court, the undivided interest of those who do "appear is to be sold, and the lien of Asa Handy is to re- "main on the part or parts unsold, to secure the payment "of so much of the money due to him as those parts may "be justly chargeable with."* (The italics are ours.)

In conclusion, we most respectfully ask that the court affirm the decree of the lower court in favor of complainant, and if for any reason the court does not see fit to affirm said decree, then inasmuch as the whole record is before the court we ask that complete justice be done, that a decree be entered in favor of appellee for the specific performance of the contract and the amount of the purchase price, to-wit, $400,000 and interest thereon at the rate of 6% per annum from the 27th day of July, A. D. 1903, according to the provisions of the contract and the laws of the state of Texas in regard to all contracts in writing. And appellee prays for such other and further relief as it may be entitled to, against appellant and the surety on his super sedeas bond, to-wit, The American Surety Company.

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